

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO (TOLEDO)

Case No. 11-00047-CIV-DAK

FEDERAL TRADE COMMISSION, )  
AND THE STATE OF OHIO, )

PLAINTIFFS, )

-v- )

PROMEDICA HEALTH SYSTEM, INC., )

DEFENDANT. )

West Palm Beach, Florida  
February 10, 2011

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TRANSCRIPT OF PRELIMINARY INJUNCTION PROCEEDINGS

BEFORE THE HONORABLE DAVID A. KATZ

SENIOR UNITED STATES DISTRICT JUDGE

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1 (Call to the order of the Court.)

2 THE COURT: Please be seated, ladies and gentlemen.

3 I think I can almost see you from here. Give me one  
4 moment, please.

5 Again, good morning, ladies and gentlemen.

6 VOICES: Good morning, Your Honor.

7 THE COURT: As you may know, the parties have agreed  
8 that this preliminary injunction hearing will today be divided  
9 as to time between the Plaintiff, FTC, and the Defendants  
10 ProMedica three hours and three hours. And we'll try, as will  
11 counsel, to stick with that. If we run over somewhat, I will  
12 understand it because of the various restrictions imposed upon  
13 us by this setup in this courtroom.

14 Tomorrow we will continue at 9:00 a.m., and I would  
15 assume we will be done somewhere between 12:00 and  
16 1:00 tomorrow.

17 Is that an accurate reflection of the time agreements  
18 that the parties have made?

19 MR. REILLY: Yes, Your Honor.

20 THE COURT: Thank you.

21 I'd like now to have counsel make their appearances  
22 for the record.

23 MR. REILLY: Good morning, Your Honor. Matt Reilly  
24 for the Federal Trade Commission, with Jeff Perry, Sara Razi  
25 and Janelle Filson, and for the State of Ohio, Beth Finnerity,

1 F-i-n-n-e-r-i-t-y.

2 THE COURT: Thank you.

3 Mr. Marx.

4 MR. MARX: Your Honor, David Marx from McDermott,  
5 Will and Emery, accompanied by Amy Hancock, Amy Carletti and  
6 Steven Wu, on behalf of ProMedica Health System.

7 THE COURT: Thank you.

8 Mr. Reilly.

9 Oh, before we get started . . .

10 (Discussion held off the record.)

11 MR. REILLY: Good morning, Your Honor.

12 THE COURT: Good morning.

13 MR. REILLY: As you know, this matter has  
14 co-plaintiffs, the FTC, Federal Trade Commission, and the  
15 State of Ohio Attorney General. I think I'll be presenting on  
16 behalf of the co-plaintiffs today unless Ms. Finnerity comes  
17 up and tackles me because I'm doing a terrible job. So absent  
18 that, I think you'll be hearing from me this morning.

19 Just going to do a quick overview before I get into  
20 some of the facts and evidence.

21 We're here today, Your Honor, because the dominant  
22 health system, ProMedica, is acquiring a fierce close  
23 competitor and already has, in fact, acquired a fierce close  
24 competitor.

25 This acquisition is unlawful in two separate relevant

1 markets and is presumed unlawful in a very strong manner, not  
2 by a short margin but by a very wide margin.

3 The Plaintiffs have presented this Court with  
4 hundreds of exhibits that already strengthen the strong  
5 presumption. The evidence that we have presented to this  
6 Court does not rely on the presumption, it strengthens an  
7 already strong presumption, and we'll talk a lot this morning  
8 about what the presumption means.

9 And this strong presumption cannot be rebutted by  
10 Defendant, especially in this 13B proceeding. We don't think  
11 they will be able to rebut the presumptions in the merits  
12 trial, but for this 13B proceeding, the challenge is  
13 overwhelming.

14 And the proposed relief that we're asking for is  
15 necessary to prevent consumer harm and maintain St. Luke's  
16 viability during the merits trial. And we'll talk more about  
17 the relief either later this morning or tomorrow.

18 Of course, Your Honor, both sides haven't put forth  
19 four-and-a-half hours of arguments because we agree on  
20 everything. We of course disagree on a lot, and that's why  
21 we're in this courtroom rather than somewhere else, on the  
22 golf course. But it's pretty astounding how much we do agree  
23 on, and throughout this presentation, I will make sure I point  
24 out to you to the best of my understanding where we agree with  
25 the Defendant and where we disagree, so you'll have a better

1 understanding of what facts are in dispute.

2 Since we last met with you, Your Honor, there's been  
3 a lot going on in the part three merits trial. Since the TRO  
4 hearing, the initial scheduling conference took place on  
5 February 5th, both parties presented about an hour of argument  
6 and an overview, and the scheduling order has been entered.  
7 There's a full discovery plan in place. Initial disclosures  
8 have been exchanged, preliminary witnesses lists due on  
9 February 16th, and interrogatories, requests for admissions.

10 As you mentioned at the TRO hearing, and this hasn't  
11 changed, nor will it, the trial on the merits will begin on  
12 May 31st, 2011, and that trial on the merits will have up to  
13 210 hours of live testimony, and we expect the administrative  
14 law judge, Judge Chappell, to issue an opinion by the end of  
15 this year.

16 So why are we here? We're here for a very simple  
17 reason, Your Honor, it's to maintain the status quo while the  
18 Commission does its Congressionally-mandated job of analyzing  
19 this transaction, having the merits trial there.

20 Maintaining the status quo means preventing  
21 phenomenal rate increases during the merits trial, prevent job  
22 reductions and service line cuts at St. Luke's, all of which  
23 have been planned, and preserve the commission's ability to  
24 obtain full and effective relief after the merits trial. That  
25 is the purpose of the 13B. Rather than letting parties

1 consummate, the 13B has been designed to make sure, if  
2 warranted, the Commission is able to get full and effective  
3 relief after they decide this in the first instance and later,  
4 to -- directly to an appeal, to the Court of Appeals directly.

5 Those are the same three goals under the voluntary  
6 hold separate agreement that was in place and still is in  
7 place, and these are the exact same objectives that we will  
8 ask for this Court to enter into an order.

9 So why are we here? Your Honor, as you understand by  
10 now, this is not the merits trial. The only purpose of  
11 proceeding under Section 13(b) is to preserve the status quo  
12 until the FTC can perform its function. And that comes from  
13 the Fourth Circuit Food Town.

14 So this Court is clear, this is not the merits trial,  
15 but what we're asking you to enter into here is very  
16 important. It's very important to make sure that interim harm  
17 through dramatic price increases don't occur. It's important  
18 to make sure St. Luke's continues the exact same service lines  
19 and same staffing levels that has allowed it to get very high  
20 patient satisfaction levels.

21 The District Court is not authorized to determine  
22 whether the antitrust laws have been or are about to be  
23 violated. Adjudicatory function is vested in the FTC in the  
24 first instance. That comes from the D.C. Circuit.

25 So that's why we're here, Your Honor, asking you to

1 please maintain the status quo of the merits trial which is  
2 already underway, which is fast-moving, comes to its  
3 conclusion.

4 So the preliminary injunction standard under 13(b) is  
5 a public interest standard. This Court should rule for us if  
6 it believes such action would be in the public interest. And  
7 that public interest has two separate elements: Likelihood of  
8 success on the merits and weighing of the equities.

9 It's been very clear in the court law that the FTC  
10 should be entitled to injunctive relief more broadly available  
11 to the FTC than private parties. The CCC Holdings is the last  
12 13(b) case opinion decided by a court.

13 And the FTC, an expert agency acting on the public's  
14 behalf, should be able to obtain injunctive relief more  
15 readily than private parties.

16 The standard for a preliminary injunction under 13(b)  
17 is significantly lower than the traditional preliminary  
18 injunction standard, and I don't think there's any dispute  
19 about that.

20 So what does likelihood of success on the merits  
21 mean? It means -- and again, this is clear in every circuit  
22 that's decided this, including the Sixth Circuit, that the FTC  
23 need only to raise serious and substantial questions. And  
24 this comes from FTC Butterworth, Sixth Circuit in 1997. "The  
25 FTC meets its burden if the FTC has raised questions going to



1 the merits so serious, substantial, difficult and doubtful as  
2 to make them fair grounds for thorough investigation, study,  
3 deliberation and determination by the FTC in the first  
4 instance, and ultimately, by the Court of Appeals."

5 The precedents irrefutably teach that in this  
6 context, the likelihood of success on the merits has a less  
7 substantial meaning than in other preliminary injunction  
8 cases. That comes again, Your Honor, from the last 13(b)  
9 opinion issued by any court in the country.

10 So the Defendant in their papers have repeated that  
11 we have a burden of likelihood of success on the merits, and  
12 they're correct. But what they don't say, and there's very  
13 little dispute and no dispute by every circuit, including the  
14 Sixth Circuit, that we meet our burden if we raise serious and  
15 substantial questions. That's all we have to do in the 13(b)  
16 proceeding agreed on by every court; and we have met our  
17 likelihood of success on the merits standard.

18 At the merits trial, we will be required to show that  
19 this acquisition violates the Clayton Act, and so I thought it  
20 would be important to give a brief overview what the Clayton  
21 Act says. The Clayton Act requires only a showing that the  
22 transaction may be -- that the effects of the transaction may  
23 be to substantially lessen competition. Not will, not will  
24 definitely; may be substantially to lessen competition.

25 In a very famous Supreme Court case, Brown Shoe,

1 famous in our little antitrust world, Congress used the words  
2 "may be "to indicate that its concern was with probabilities,  
3 not with certainties.

4 In another well-known Supreme Court case,  
5 Philadelphia National Bank, the fundamental purpose of  
6 amending Section 7 was to arrest the trend towards  
7 concentration, the tendency to monopoly, before the consumer's  
8 alternatives disappear through the merger. And that's what's  
9 known as the incipency standard, Your Honor. The Clayton Act  
10 allows the FTC to act without showing certainty if there may  
11 be substantially less in competition because rather than  
12 waiting and seeing what the actual effects of an acquisition  
13 are and see what harm occurs, that is not in the public  
14 interest.

15 And, again, the last 13(b) case decided in the  
16 country: "To establish a violation of Section 7, the FTC need  
17 not show that the challenged merger will lessen competition,  
18 but only that the loss of competition is a sufficiently  
19 probable and imminent result of the merger acquisition."

20 So that is the standard when it comes to likelihood  
21 of success, Your Honor. If we raise serious substantial  
22 questions that warrant further investigation, we have met our  
23 likelihood of success on the merits prong of 13(b).

24 The second element under 13(b) is weighing the  
25 equities. Those are the two. It's pretty simple, at least in

1 the words.

2 And the FTC almost -- always chose the equities  
3 because the public equities are more important than private  
4 equities, and the most important public equity is effective  
5 enforcement of the antitrust laws. That was the specific  
6 intent of Congress when enacting 13(b), again from CCC  
7 Holdings. Private equities are not proper considerations for  
8 granting or withholding injunctive relief under 13(b).  
9 Instead, public equities are paramount.

10 And to put this in more context, Your Honor, no court  
11 in the country has ever decided against the FTC in a 13(b)  
12 case after they met their likelihood of success on the merits  
13 requirement after they raised serious substantial questions  
14 because a paramount public equity is effective enforcement of  
15 the antitrust laws, the FTC has never been denied relief in a  
16 13(b) case where it's met its burden on that prong.

17 We're also going to be talking a lot this morning  
18 about the presumption of harm, and we believe that at least  
19 for one of the markets, the large market, the presumption of  
20 harm is undisputed here. And the Courts place substantial  
21 weight on the presumption of anticompetitive effects.

22 And this comes again from Philadelphia National Bank.  
23 "A merger that causes undue market share and significantly  
24 increases concentration is so inherently likely to lessen  
25 competition substantially, that it must be enjoined in the

1 absence of evidence clearly showing that a merger is not  
2 likely to have such anticompetitive effects." That's the  
3 strength of presumption, presumption of illegality once the  
4 FTC shows undue market share and concentration.

5 And this is from Whole Foods in the D.C. Circuit.  
6 "Once undue concentration is shown, the FTC is entitled to a  
7 presumption against the merger on the merits, and therefore,  
8 does not need detailed evidence of anticompetitive effects at  
9 this preliminary stage."

10 And it's important for us to point out that we only  
11 have to show undue concentration in one market. In this  
12 matter, Your Honor, we have shown undue concentration, a  
13 strong presumption in two separate relevant product markets.

14 And in Warner Communications, from the Ninth  
15 Circuit --

16 THE COURT: Go ahead, and then I have a question.

17 MR. REILLY: The Ninth Circuit talks about what the  
18 Court's role is in this preliminary proceeding. The Court  
19 does not resolve conflicts in the evidence, compare  
20 concentration ratios and effects on competition in other  
21 cases, or undertake an extensive analysis of the antitrust  
22 issues at the preliminary relief stage.

23 THE COURT: I am fairly certain, but I want to make  
24 sure that when you talk about markets you're not talking about  
25 Toledo and Lucas County; you're talking about the segments

1 within an institution, such as ProMedica or St. Luke's or  
2 other competing institutions.

3 MR. REILLY: Yeah, when we talk about markets, Your  
4 Honor, there are two markets that we define: The relevant  
5 product market, which could be obstetric services, general  
6 acute care services, and then the geographic market, which is  
7 Lucas County. Those two combined will get you the market  
8 shares and market concentrations. You have to do both to make  
9 those calculations.

10 And, again, the D.C. Circuit very recently held that  
11 the courts trench on the FTC's role when they choose between  
12 plausible, well-supported expert studies. Again, court after  
13 court has recognized, Your Honor, that this is a preliminary  
14 proceeding, and that the merits trial in this case is ongoing.  
15 The opening statements will be coming in May, and that is  
16 where the Congress wanted the Commission to do its job in the  
17 first instance.

18 I realize that this Court is very familiar with  
19 ProMedica and all the hospitals in Lucas County, but I guess  
20 for the benefit of maybe people in the galleries, I'll do a  
21 brief overview of ProMedica and then, St. Luke's.

22 ProMedica is a health system of 10 hospitals, not  
23 including St. Luke's, located throughout northwest Ohio and  
24 southeast Michigan. In Lucas County, ProMedica has three  
25 hospitals, the Toledo Hospital, 660 staff beds; Bay Park

1 Community Hospital with 86 staff beds, and Flower Hospital  
2 with 257 staff beds.

3 ProMedica also owns a for-profit Paramount Health  
4 Care, one of the largest commercial health plans in Lucas  
5 County, where it is clear that when Paramount makes business  
6 decisions, it considers the impact on the ProMedica hospitals.  
7 When ProMedica hospitals make business decisions, it considers  
8 the impact on Paramount. ProMedica's ownership of Paramount  
9 are not our primary issue we're relying on in this case on the  
10 merits trial, it does add to the likely competitive harm that  
11 will result from this transaction.

12 ProMedica is self-proclaimed as the dominant provider  
13 of healthcare. Month to month, ProMedica health system has  
14 market dominance in the Toledo MSA, and the self-proclaimed  
15 dominant hospital provider in Lucas County.

16 And I want to point out, Your Honor, that the first  
17 sub-bullet there, "ProMedica health system has market  
18 dominance in the Toledo MSA," that comes from ProMedica's  
19 presentation to Standards & Poor. It is not a middle manager  
20 in a cubical writing a memo that was never distributed and  
21 that no one read. This was an official ProMedica presentation  
22 to Standard & Poor. Standard & Poor relies on these  
23 presentations to give ProMedica its credit rating, and people  
24 rely on ProMedica's credit rating to lend money to ProMedica.

25 There is a strong fiduciary duty to be as fair and

1 accurate as possible when making presentations to Standard &  
2 Poor's, and they call themselves -- they said they have market  
3 dominance to Standard & Poor's.

4 St. Luke's is a general acute care hospital with 178  
5 staff beds. It's located in Maumee, a southwestern suburb of  
6 Toledo. I think there's no dispute about this at all, Your  
7 Honor, that St. Luke's ranks high in quality and patient  
8 satisfaction. The hospital is regularly recognized by  
9 third-party quality rating organizations that rank St. Luke's  
10 within the top 10 percent of hospitals nationally. St. Luke's  
11 has very high clinical outcome measures and high patient  
12 satisfaction scores. And the fact that St. Luke's is a very  
13 high quality low cost hospital is not disputed by the  
14 Defendant.

15 In their submissions by the expert, ProMedica's  
16 submission by the expert in their pretrial briefings,  
17 ProMedica has claimed that St. Luke's is just not a  
18 significant competitor. They're just not significant. They  
19 have very few discharges per day, they have very few  
20 obstetrics discharges per day, and they say only 10 a day.  
21 But it's important to put this in context, Your Honor, in  
22 Lucas County. St. Luke's volume is greater than almost every  
23 other hospital in Lucas County. By commercial discharges, the  
24 things we're focusing on in this preliminary injunction  
25 proceeding, St. Luke's is the third largest hospital in Lucas

1 County, larger than UPMC on commercial discharges for general  
2 acute care services, larger than Flower, larger than  
3 St. Charles, larger than St. Anne, and larger than Bay Park.

4 So by some logic that you shouldn't be concerned  
5 about an acquisition of an insignificant competitor, that  
6 would apply to the vast majority under that standard of  
7 hospitals located in Lucas County.

8 THE COURT: Would you consider, Mr. Reilly, the  
9 self-proclaimed dominant hospital provider language that  
10 you've quoted just a few moments ago for purposes of this case  
11 as a -- an admission against interest?

12 MR. REILLY: Yeah, I would consider it an admission  
13 against interest because our theory is they have been telling  
14 people outside of ProMedica that they are dominant, and when  
15 you acquire a close, vigorous competitor like St. Luke's, they  
16 become even more dominant. The starting point prior to  
17 acquiring St. Luke's was they were self-proclaimed dominant  
18 provider in Lucas County. And when you acquire a close  
19 competitor you become even more dominant. Those sort of  
20 findings are relevant for an antitrust investigation and a  
21 merger investigation.

22 So don't take our word for it that based on our  
23 numbers that St. Luke's is the third largest hospital in Lucas  
24 County. Mr. Wakeman, the CEO, recently was celebrating the  
25 same fact. He wrote in a July 2010 e-mail to other executives



1 at St. Luke's, [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 They are a significant hospital by any standard  
6 within Lucas County.

7 ProMedica has also argued that St. Luke's is not  
8 unique. They don't offer any unique services. Everything  
9 they offer is offered at the ProMedica hospitals. And, Your  
10 Honor, that's exactly the point. That's why we're here today.  
11 If St. Luke's offered only psychiatric care, offered something  
12 that ProMedica didn't offer, we wouldn't even open an  
13 investigation. The fact that they're offering the exact same  
14 services that ProMedica does and they're competing vigorously  
15 to draw and attract patients, that's why we're here. The fact  
16 that St. Luke's does not offer unique services is a reason why  
17 there's a competitive problem from this acquisition. It's not  
18 a reason why there isn't a problem.

19 ProMedica and St. Luke's have termed this acquisition  
20 as a joinder. I just want this Court to be clear that the  
21 joinder is a functional equivalent of an acquisition.  
22 ProMedica acquired St. Luke's as Ms. Hanley said in an  
23 investigational hearing, that St. Luke's has become us.

24 And ProMedica's economic and decision-making control  
25 at St. Luke's is not disputed. They will negotiate health

1 plan contracts at St. Luke's, approve strategic plans, annual  
2 operating and capital budgets, and they will pool St. Luke's  
3 funds and assets with ProMedica for investment. As PX223  
4 states, bottom line, for accounting purposes, ProMedica has  
5 acquired St. Luke's. So while it's being termed as a joinder,  
6 it is an acquisition under Section 7, and it is de facto  
7 control of St. Luke's by ProMedica.

8 We also heard some talk about, well, St. Luke's  
9 has -- still has an independent board, and so they will play  
10 some role in making sure that the hospital keeps the same  
11 services and so in some ways that the order is not necessary  
12 because of the independent St. Luke's board.

13 Prior to the acquisition, Mr. Wakeman, the CEO of St.  
14 Luke's, predicted that ProMedica would have a window dressing  
15 local board for St. Luke's. And he was right. Within 18  
16 months, ProMedica will have approval of two thirds of St.  
17 Luke's board, and it will have a right to remove any board  
18 member with or without cause after a short stub term, as it's  
19 called, after that period expires.

20 So let me give you, Your Honor, a brief overview of a  
21 Section 7 case, prima facie Section 7 case established when  
22 the FTC makes a showing that the transaction would lead to  
23 undue concentration in the market for a particular product in  
24 a particular geographic area. The D.C. Circuit in Whole Foods  
25 thought that even at this preliminary stage, the FTC did not

1 have to determine what the relevant product markets were. We  
2 have, in fact, alleged two relevant product markets fully  
3 supported by the evidence, and both of those markets, as I  
4 will show, there is a significant undue concentration which  
5 creates a presumption of illegality of this transaction in  
6 which the Defendants have to rebut. Once we show our -- once  
7 we meet the burden of our presumption, the burden of  
8 production shifts to the Defendant to attempt to show that the  
9 presumption does not accurately indicate probable  
10 anticompetitive effects. That's what they have to do after we  
11 meet our presumption, and if they don't, we're entitled to  
12 preliminary relief.

13 The first relevant product market is general acute  
14 care inpatient hospital services. That is what we call a  
15 broad cluster market of inpatient surgical, medical and  
16 supporting services that are provided in a hospital setting to  
17 commercially-insured patients. It excludes outpatient,  
18 psychiatric and tertiary services but includes most of the  
19 basic services that require an overnight hospital stay.

20 And there is no dispute, Your Honor, by Defendants  
21 that this is a relevant product market, it's appropriate, and  
22 this is consistently recognized by the courts, including the  
23 Sixth Circuit, as being an appropriate market.

24 So when I say cluster markets, Your Honor, what that  
25 means is, I think everyone in this Court knows that knee

1 surgery is not a substitute for a hip surgery, for example.  
2 You're not going to get a hip surgery if there's a price  
3 increase for knee surgery, but it's a cluster market.

4 It's really an analytical tool for convenience. You  
5 put all the general acute care services in a cluster, and you  
6 analyze the competitive effects and dynamics of the cluster,  
7 rather than going service by service by service. It would be  
8 appropriate to go service by service, but I think the  
9 courtroom will be pretty empty by the time we get into about  
10 20 services because of the tedium of doing that.

11 But it's important to remember the only services that  
12 should be put in the cluster are the ones that have the exact  
13 same competitive dynamics and market participants as the other  
14 goods in the cluster. That's when you do it. In the Southern  
15 District of New York in 2009, the Emiga Group said it very  
16 well: "It's used as a matter of political convenience because  
17 there's no need to define separate markets for a large number  
18 of individual hospital services when market shares and entry  
19 conditions are similar for each."

20 And that's the key language, Your Honor: When market  
21 shares and entry conditions are similar for each. If they're  
22 not, there's no discretion to put it in the cluster. You  
23 cannot put a good in the cluster market that has different  
24 market participants and different market shares because it  
25 would mislead this Court and imply that, yeah, this same

1 competitive dynamics exists for the other services.

2 Our expert, Professor Town, stated that the purpose  
3 of the cluster market is to formulate aggregates across those  
4 products in order to do the analysis in a practical way. And  
5 that's what it is, it's practical convenience. That's why we  
6 use cluster markets.

7 In Little Rock Cardiology, it was clear that if  
8 there's some good that there is no overlap, some service that  
9 one hospital offers that the other doesn't, it's not  
10 appropriate to put in the cluster market. So in this case the  
11 cluster market is the cluster of services offered by St.  
12 Luke's for which ProMedica hospitals overlap, meaning offer  
13 the same services.

14 The second relevant product market is inpatient  
15 obstetrical services. I think it's safe to say there has been  
16 a dispute about this relevant product market, and there is a  
17 very simple reason why obstetrical services should not be put  
18 in the general acute care cluster market services.

19 UTMC and Mercy St. Anne do not offer obstetrics. So  
20 in our general acute care market, UTMC is a competitor. They  
21 have some share. And by putting obstetrics in that cluster,  
22 we're saying, well, UTMC looks like they still have some share  
23 and presence. They don't. You move goods, services form a  
24 cluster when the market participants and market shares are  
25 different.

1           And that's why we are having a separate market for  
2     obstetrics to account for the different competitive  
3     conditions. It's the exact same reason, Your Honor, why you  
4     exclude outpatient and tertiary services from general acute  
5     care. For outpatient services there are usually many more  
6     competitors. There might be many more competitors, there  
7     could be ambulatory surgical centers, there could be imaging  
8     centers. There could be a lot of things that make the  
9     competitive dynamics different. That is why we exclude  
10    outpatient, that's why tertiary services are excluded from the  
11    general acute care product market, because the tertiary  
12    services people are willing to travel much further. Those  
13    services are not in the general acute care market.

14           In the Sixth Circuit, even set up different markets  
15    based on different competitive conditions. This is the  
16    Butterworth case. Where in Butterworth in the Sixth Circuit  
17    accepts two market definitions, general acute care inpatient  
18    hospital services and primary care inpatient hospital  
19    services, each with different competitors.

20           I don't think -- I don't think there's much reason to  
21    guess why the Defendant is fighting so much on us alleging a  
22    separate market for obstetrics. And it's really for a simple  
23    reason. To the market for obstetrics, this acquisition  
24    creates a merger to duopoly with ProMedica having more than  
25    80 percent share. And the Defendant is fully aware that no

1 court has ever sanctioned a merger to duopoly, never mind in a  
2 13(b) setting, and that's why we're fighting over this.

3 So the Defendant has come up with a couple arguments  
4 that we understand of why there shouldn't be a separate market  
5 for obstetrics. One is that negotiating rates -- they argue  
6 that when you negotiate rates as a bundle, it doesn't really  
7 matter what the market power is for any one good, the bundle  
8 price is all that matters. And it's pretty clear analytically  
9 that negotiating rates for a bundle of services does not  
10 prevent the exercise of market power over any one service.

11 The simple analogy, is Your Honor, if you had two  
12 goods and they're both competitive goods and you're buying  
13 them in a bundle, and you got a monopoly in one, you'd expect  
14 the bundle price to reflect the market power for one of the  
15 goods. It's not, that, oh, as long as you have some  
16 competition for one of the goods, that market power over all  
17 the other goods won't be exercised.

18 And Professor Town explains in paragraph 81 of his  
19 expert declaration the rationale and reasoning for that.  
20 ProMedica's expert did not give an opinion on this.

21 Also another reason, even putting aside that the  
22 price of the bundle will reflect the market power for each  
23 individual good in that bundle, there's also another very  
24 important fact, and we've redacted this. Hospitals in Lucas  
25 County, including the hospitals St. Luke's and ProMedica often

1 carve out, often separate for OB services separately. So to  
2 the extent that the price of the bundle of goods -- this is  
3 page 21, Your Honor.

4 THE COURT: I'm there. Thank you.

5 MR. REILLY: To the extent that there's any reason to  
6 believe, which there isn't, that the price of the bundle will  
7 somehow reflect competition throughout the entire bundle  
8 rather than the market power for any good, ProMedica, after  
9 the merger to duopoly, with more than an 80 percent share in  
10 this market could easily tell health plans, let's contract for  
11 obstetrics separately and here's what the rate's going to be.  
12 The bundle doesn't protect health plans and employers from a  
13 carve-out. These carve-outs happen a lot in Lucas County.  
14 We've given you several examples in your slides, and it surely  
15 will happen after ProMedica has an 80 percent-plus share.

16 Now I'm turning to relevant geographic market. We've  
17 just talked about relevant product market. And this is  
18 usually, Your Honor, usually in hospital merger cases where  
19 the biggest fight occurs. The FTC typically alleges a narrow  
20 geographic market, and the Defendant alleges a much broader  
21 geographic market. The reason being the broader the  
22 geographic market, the less concentrated the market is.

23 And so let me tell you what the key question is to  
24 determine geographic market. If a hypothetical monopolist  
25 acquired all of the hospitals in Lucas County, could it raise



1 rates to commercial health plans by five to 10 percent?

2 That's a question. So let me put this in context of Lucas  
3 County.

4 We're here today because ProMedica acquired St.  
5 Luke's, and we think the evidence overwhelmingly demonstrates  
6 that there will be dramatic price increases at St. Luke's and  
7 also very likely price increases at ProMedica, as well. To  
8 determine relevant geographic market, it's a different test.  
9 What it means, Your Honor, is if ProMedica acquired Mercy  
10 St. Anne's, Mercy St. Charles, Mercy St. Vincent's, UPMC and  
11 St. Luke's, if ProMedica, for example, had a monopoly,  
12 controlled all of the hospitals in Lucas County, could they  
13 raise rates by a mere five to 10 percent? And if the answer  
14 to that question is yes, then the geographic market is Lucas  
15 County.

16 And that analytical tool which is in the guidelines,  
17 in the case law, is not in dispute.

18 And throughout the six-month investigation and even  
19 today, it appears to us that the Defendant concedes the  
20 relevant geographic market is Lucas County for general acute  
21 care services. And for good reason. I don't think there's  
22 any evidence in the entire record that would lead one to  
23 believe that if ProMedica acquired all the Mercy Hospitals,  
24 UPMC, and St. Luke's, they would not be able to raise rates by  
25 a small but significant amount, five to 10 percent.

1           And the supporting evidence on the geographical  
2     market is this slide 22, Your Honor, is very strong. We have  
3     health plan testimony that support this geographic market,  
4     testimony from other third-party hospitals. We see when you  
5     look at who's leaving Lucas County for general acute care  
6     services, very, very few are leaving, less than three percent  
7     of Lucas County residents are getting care anywhere else.  
8     They don't travel for general acute care services.

9           And for obstetrics patients, it's less than one  
10    percent of Lucas County residents are leaving Lucas County.  
11    The appropriate geographic market here is Lucas County for  
12    both general acute care services and for obstetrics.

13           Again, talking about obstetrics and the merger to  
14    duopoly, only ProMedica and Mercy offer OB services after this  
15    acquisition.

16           For the general acute care market, ProMedica's own  
17    expert acknowledged that it's more likely than not that Lucas  
18    County is the general acute care market under the hypothetical  
19    monopolist test.

20           And so when we're trying to determine what the  
21    relevant geographic market is for obstetric services, here's  
22    basically what it comes down to. So the Defendant  
23    acknowledges that for the hundreds of services in the general  
24    acute care bundle, the appropriate geographic market is Lucas  
25    County. But for the one service, the one service, obstetrics,

1 where it creates a merger duopoly, they're implying that Wood  
2 County Hospital should be in that geographic market.

3 So for the hundreds of services in general acute  
4 care, geographic market, Lucas County; for obstetrics, Lucas  
5 County plus Wood County. And Your Honor, I have to tell you  
6 that's pretty implausible, with all due respect. I could see  
7 if you're having elective hip surgery, you might be willing to  
8 travel a little bit further for a general acute care service  
9 such as that. But when the woman is in labor and there's  
10 quite a rush to get to the hospital, no one is going from  
11 Lucas County to Wood County. We made the drive from the  
12 center of Lucas County to Wood County Hospital. We made the  
13 drive from St. Luke's to Wood County Hospital.

14 I also happen to have a six-month pregnant wife at  
15 home. The entire time I was making that drive I'm like, my  
16 wife would kill me if I drove her all the way to Wood County  
17 to have the baby. There aren't enough flowers around that I  
18 would have to buy her for that anger she would have.

19 And the numbers support this, Your Honor. Only  
20 six-tenths of one percent of Lucas County residents obtain OB  
21 services outside of Lucas County. For Wood County, it's less  
22 than two-tenths of one percent. No one from Lucas County is  
23 going to Wood County to deliver their babies. They wouldn't  
24 go to Lucas County if there's a monopoly, they wouldn't leave  
25 Lucas County if there's a monopoly or a slight price increase

1 for obstetrics. And so the appropriate geographic market for  
2 both the general acute care services and the obstetrics market  
3 is Lucas County.

4 I'm just showing you again, affirming what I just  
5 mentioned, that the average driving time, and even looking at  
6 the percentiles, for obstetric services is only 11.3 minutes.  
7 Even for the five percent of patients who travel the longest,  
8 the average drive time is just 24.5 minutes. Wood County  
9 Hospital is 33 minutes away from central Lucas County.

10 I know Your Honor is very familiar with Mercy health  
11 partners, so I'll be very brief on this. Mercy health  
12 partners has three hospitals: St. Vincent's, St. Charles and  
13 St. Anne's. St. Anne's, again, Your Honor, does not offer  
14 obstetrical services.

15 One thing that this Court might not realize, that in  
16 the geographic and prior market that we've alleged, Pro --  
17 Mercy is 60 percent smaller market share than ProMedica. You  
18 hear a lot about there being a mirror image, ProMedica and  
19 Mercy is identical. Mercy is 60 percent smaller market share  
20 than ProMedica. ProMedica's significantly larger.

21 And in the southwest Lucas County, where in  
22 particular St. Luke's and ProMedica are fighting for patients,  
23 where the patient's number one and number two choices are  
24 either ProMedica or St. Luke's, Mercy's share is very small,  
25 almost 25 percent less than both ProMedica and St. Luke's.

1 They are not mirror images or identical, and of course, Mercy  
2 does not have ownership in Paramount or any other health plan.

3 UTMC has 226 staff beds. They do, of course, offer  
4 tertiary services. Their market share for the general acute  
5 care market is about equal to St. Luke's, and they, too, do  
6 not offer obstetrical services.

7 So, again, the Defendant has basically claimed that  
8 ProMedica and Mercy are twins, they're mirror images of each  
9 other, and let's look at what the differences are.

10 For inpatient market shares, ProMedica is almost  
11 47 percent, Mercy's 28.7 percent. And, Your Honor, this is  
12 before ProMedica acquired St. Luke's.

13 For obstetric market shares, ProMedica has a  
14 71.2 percent share, Mercy a 19.5 percent share. And, again,  
15 Your Honor, this is before ProMedica acquired St. Luke's and  
16 now has over an 80 percent market share, an extraordinary  
17 market share in obstetric services.

18 ProMedica offers OB services at all Lucas County  
19 hospitals, Mercy does not. ProMedica owns an integrated  
20 health plan, Mercy does not. [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED] They are not mirror images of  
24 each other, Your Honor, despite where the location and the  
25 maps of the Defendant shows.

1           So we've talked a lot about the standard in 13(b),  
2           and we've mentioned the presumption of illegality once we show  
3           undue concentration. This slide, Your Honor, shows what we're  
4           talking about. There's not only a strong presumption, there's  
5           actually a very strong presumption of competitive harm that  
6           this merger has created. And the Courts have found there to  
7           be a presumption of illegality at even lower levels than this.  
8           The merger guidelines have a HHI of 2500 or more. That's a  
9           highly concentrated market. If the market becomes more  
10          concentrated by a level of 200 and that becomes a point where  
11          the presumption is created under the merger guidelines, and  
12          the courts have even a lower standard historically for when  
13          the presumption is created.

14           As we talked about, this acquisition exceeds these  
15          standards for a presumption by a wide, wide margin.

16           For general acute care, ProMedica and St. Luke's  
17          shares 58.3 percent of the Lucas County market. The  
18          post-acquisition, HHI is 4,391, 4,391. That is almost 2000  
19          points above what the guidelines call are a highly  
20          concentrated market.

21           And the change in HHI for the general acute care  
22          market is 1078, almost five times, more than five times the  
23          amount necessary for us to be entitled to a presumption that  
24          this merger is illegal, which is very important in the merits  
25          trial and is even more important in a 13(b) proceeding.

1           For obstetrics, the market shares are, as I said,  
2           again, Your Honor, extraordinary. ProMedica and St. Luke's  
3           has a combined 80.5 percent market share. The  
4           post-acquisition is 6,854, which is almost three times as much  
5           as what you need for a highly concentrated market, and the HHI  
6           increase is 1323, almost seven times higher than what you  
7           would need to get the presumption. This is a very, very  
8           strong presumption and creates an incredible challenge for the  
9           Defendant to rebut, which they must in order to prevail here.

10           Amazingly, Your Honor, for general acute care, the  
11           Defendant has conceded that that's the right market, those are  
12           the right market shares, and that the presumption based on  
13           these numbers alone are intact. That's not an issue of  
14           dispute here. They've conceded that that for general acute  
15           care is the appropriate market and the appropriate market  
16           shares.

17           As I mentioned, the Supreme Court and other courts  
18           around the country have put a lot of weight on the presumption  
19           of illegality. It's very important for them because, again,  
20           once you get market shares and market concentrations that are  
21           that high, there is a strong presumption that the merger's  
22           illegal and that the merger will cause competitive harm.

23           THE COURT: Pardon me.

24           MR. REILLY: Sure.

25           THE COURT: That the mergers are illegal or legal?

1 MR. REILLY: The mergers are illegal.

2 Philadelphia National Bank, a Supreme Court case in  
3 1963, combined share was 30 percent for the merging companies.  
4 The Court held that that merger was illegal.

5 University Health, Eleventh Circuit hospital merger  
6 case, the combined share was 43 percent. The Eleventh Circuit  
7 found that merger was illegal.

8 Cardinal Health, another 13(b) case, combined share,  
9 there were two mergers there, 13 -- 37, excuse me, and almost  
10 40 percent. The Court found that that merger was illegal.

11 And then the Northern District of Ohio, 198413(b)  
12 case, Bass Brothers, 29 percent combined share. The Court  
13 found that that merger was illegal. All these based on the  
14 presumption.

15 ProMedica, general acute care market share is  
16 58 percent, for obstetrics 81 percent, far in excess of the  
17 combined market shares that courts have already found to be  
18 illegal because of the presumption.

19 So what do the Defendants argue? They've conceded  
20 that there are very high market shares here, and -- for at  
21 least the general acute care. And for obstetrics, their  
22 pretty extraordinary market share's even higher. So I think  
23 they're arguing that market shares don't matter, they don't  
24 matter, this Court shouldn't consider the strong market  
25 shares, the high market shares and the strong presumption as



1 created from this acquisition. So what we did is we put up  
2 the market shares of every participant in Lucas County: 11.5  
3 for St. Luke's, 13 for UTMC, 28.7 for Mercy, and 46.8 for  
4 ProMedica.

5 We're trying to test, do these market shares predict  
6 higher prices, predict the rates that those hospitals are able  
7 to get from health plans? And what you'd expect to see if  
8 market shares really weren't relevant or didn't have any  
9 meaning is pretty much a straight line. Each hospital would  
10 get very similar pricing levels. In fact, you might expect  
11 that the larger hospitals would have lower cost because all  
12 these alleged efficiencies and their pricing would be lower.

13 Well, Professor Town, our expert, analyzed the  
14 relative pricing for each hospital in Lucas County controlled  
15 for acuity, meaning that it was an apples to apples  
16 comparison, to the volume adjusted basis. And it's important  
17 to know that he was the only expert in this case who looked at  
18 relative pricing at both hospitals.

19 Ms. Guerin-Calvert, ProMedica's expert, did not. So  
20 this is what Professor Town's pricing level has found.

21 St. Luke's, with the lowest market share, has the  
22 lowest pricing, UTMC with slightly higher market share has  
23 slightly higher pricing, Mercy with higher market share than  
24 UTMC, has higher pricing, and ProMedica, with its 40, almost  
25 47 percent market share, has the highest pricing. So rather

1 than market shares being meaningless predictors of pricing and  
2 rates that hospitals can get from health plans and employers,  
3 it's almost a perfect predictor.

4 In fact, Your Honor, if someone asked you to guess or  
5 predict what the hospital rates are for each hospital and what  
6 they get from health plans and from employers, if you could  
7 have one piece of information, one piece of information to  
8 predict that, it would be market shares. Market shares mean  
9 higher rates in Lucas County. This acquisition, added to  
10 ProMedica's dominance by already adding to their very high  
11 market share and the very high pricing power in Lucas County.

12 As I already mentioned, Your Honor, and hopefully  
13 demonstrated, that the market shares and market concentration  
14 figures alone, alone create a very strong prima facie case.  
15 Because of the market shares and the market concentration  
16 numbers, there is a very strong presumption recognized by the  
17 courts, recognized by the merger guidelines that this merger  
18 is illegal because it would create and cause competitive harm  
19 to the citizens of Lucas County.

20 But we do not rest on the presumption. We could. We  
21 could sit down, and I don't think the Defendants can rebut the  
22 presumption, especially in a 13(b) proceeding, where all we  
23 have to do is raise serious and substantial questions, that's  
24 all we have to do, and the presumption alone gets us to that  
25 point on the likelihood of success. But we didn't stop there,

1 Your Honor.

2 We have put together an extraordinary number of  
3 documents, over a thousand exhibits that support our theory of  
4 competitive harm and bolster the presumption, expert analysis,  
5 five expert reports, 16 investigational hearings, 17 employer  
6 declarations, four hospital declarations, five physician  
7 declarations, six health plan declarations, eight fact witness  
8 depositions and four expert depositions.

9 So to the extent that we are standing before this  
10 Court, who's making a very important decision, expecting a  
11 rubber stamp because of our presumption, that is not true. We  
12 have gathered a lot of evidence, and this evidence doesn't  
13 weaken the presumption, it doesn't maintain the presumption;  
14 it strengthens the presumption.

15 And one fact alone, as we already talked about, the  
16 relative pricing at each of the hospitals, ProMedica's pricing  
17 is more than 70 percent on average more expensive than St.  
18 Luke's. And so if all that happened in this merger, if all  
19 that's happened is that ProMedica raised St. Luke's prices to  
20 ProMedica's own current rates, prices would go up to  
21 extraordinary levels. This is what health plans which we  
22 talked about are very concerned about. This is what St.  
23 Luke's board expected to happen, and also, even though there  
24 are statements to the contrary, this is what ProMedica  
25 expected to happen and tell its potential partners this.

1           And we haven't even talked, which we'll talk about  
2       later, what happens when a self-proclaimed dominant firm  
3       becomes more dominant, what happens to their ability to get  
4       higher prices from health plans and employers in Lucas County?  
5       This is just a simple fact that if St. Luke's, now that  
6       they're part of ProMedica, now that they no longer have  
7       10 percent market share and have a 60 percent market share for  
8       general acute care services, have an 80 percent market share  
9       for obstetrics, what will happen to their prices.

10           So the statement has been made by Defendants pretty  
11       frequently that they're shocked, shocked that St. Luke's had  
12       in their documents all about this extraordinary, outstanding  
13       managed care pricing of ProMedica, how St. Luke's rates will  
14       increase dramatically and saying that they never got that from  
15       them.

16           Well, Your Honor, they did get it from them. This is  
17       a partnership presentation that ProMedica makes to potential  
18       partners. This is what, kind of nice to meet you, let me tell  
19       you what the benefits are of joining ProMedica. One of the  
20       benefits are payor system leverage. ProMedica tells that, to  
21       try to get potential partners to join them.

22           And to be clear, when business people use terms like  
23       leverage and clout, they're describing market power, Your  
24       Honor. Payor system leverage, ProMedica's using that as a  
25       marketing tool to say, come join our partnership, we have

1     payor system leverage, and you will have it, as well, if you  
2     join us.

3             We're going to go through a lot of St. Luke's  
4     documents and make this exact same point that are perfectly  
5     consistent with that theory in this case these are ordinary  
6     course documents from the highest St. Luke executives, most  
7     often the CEO, sending memos to the board of directors. These  
8     are not, again -- there is a middle manager defense that we  
9     hear about, that this middle manager wrote this, he or she  
10    didn't know what they were talking about, ignore it.

11            I have yet to hear a crazed CEO defense or a crazed  
12    board of directors defense. These documents that we're going  
13    through right now were sent by senior executives at St. Luke's  
14    to the St. Luke's board of directors so that the St. Luke's  
15    board of directors could make the most important decision they  
16    have had to make in years, at least 15 years, according to  
17    Mr. Wakeman, the CEO.

18            St. Luke's talks about it, if they joined a system in  
19    Lucas County, their value would be diluted and their payments  
20    will skyrocket, skyrocket. That's what would happen to their  
21    rates if they joined the system.

22            This is their presentation that Mr. Wakeman, the CEO,  
23    made to St. Luke's board of directors in deciding what should  
24    they do going forward in terms of remaining independent or  
25    look for a partner. Mr. Wakeman presented to the entire board

1 of directors: ProMedica, believed to have the most favorable  
2 managed care contracts in the area. Again, on another page,  
3 impact on community, the St. Luke's affiliation with ProMedica  
4 has the greatest potential for higher hospital rates. A  
5 ProMedica-St. Luke's partnership would have a lot of  
6 negotiating clout. This is St. Luke's to its board of  
7 directors in talking about one of the benefits of joining  
8 ProMedica.

9 And just to make sure everyone understood, this is  
10 from the due diligence meeting, and ProMedica or Mercy  
11 affiliation could still stick it to employers. That is, in  
12 case there was any ambiguity, to continue forcing higher rates  
13 on employers and insurance companies. That's the impact that  
14 St. Luke's anticipated from this acquisition. That's  
15 consistent, perfectly consistent, why we're here today, that  
16 this merger will harm consumers, that this merger's not good  
17 for the community because it will result in higher rates for  
18 employers, employers in Lucas County. St. Luke's, prior to  
19 the acquisition, agreed.

20 Again, talking about if they join, they go to the  
21 dark green side. This is -- I think refers to ProMedica. We  
22 may pick up several million dollars in additional health plan  
23 fees. Again, join ProMedica, get higher rates from health  
24 plans, get higher rates from employers, and that was the  
25 anticipated likely effect of joining ProMedica. There's no

1 ambiguity here, Your Honor, none at all.

2 Again, another document. This is from Mr. Wakeman,  
3 the CEO, to board members. If we consider merging with one of  
4 the large systems, any hope of lower cost and improved quality  
5 will be diminished. Again, anticipating the likely impact and  
6 effects of joining a large system like ProMedica.

7 So we have ordinary course documents from ProMedica  
8 and from St. Luke's that fully anticipate what will happen to  
9 rates when St. Luke's joins ProMedica. This is slide 37, Your  
10 Honor. We redacted the specific testimony. This is what the  
11 health plans are saying about the transaction: I expect a  
12 rate increase of approximately 20 to 30 percent within three  
13 years. The acquisition could also give ProMedica enough  
14 leverage to increase rates across all of its Lucas County  
15 hospitals.

16 Another rating plan. St. Luke's actual reimburse  
17 rates are 40 to 55 percent lower than Flower and Park. After  
18 acquisitions, rates of the -- the rates of the community  
19 hospital rise to acquirer's rates.

20 And so there is a lot more testimony from health  
21 plans. It's important, Your Honor, to point out that,  
22 especially in light of ProMedica's argument that this  
23 acquisition will improve quality of care, improve coordination  
24 of care, result in better outcomes, fewer unnecessary tests,  
25 less readmissions, all these great things, health plans, to

1 the extent that they believe it, should be very supportive of  
2 this acquisition. They should be, because lower healthcare  
3 cost is good for them and good for their bottom line. There  
4 is not one health plan, not one health plan, there's nothing  
5 in the record that shows any support by any health plan for  
6 this acquisition.

7 In some of the predicted rate increases that you have  
8 on your redacted slide, you may note that those are, for the  
9 numbers we put in there, lower than the 70 percent estimate of  
10 Professor Town. In fact, the 70 percent is a average based on  
11 adjusted for volume. And so for one health plan has  
12 significantly low lower rates at St. Luke's than at ProMedica,  
13 which in this case it does, you'd expect to see different  
14 health plans having different rate differentials.

15 And also, Your Honor, I think it's important to point  
16 out that we're still talking about dramatic price increases,  
17 whether you're evaluating how much more expensive ProMedica is  
18 now for the same services than St. Luke's, what the health  
19 plans are saying, we are having some sort of a range of what  
20 the likely price increases will be after this acquisition at  
21 St. Luke's, and all of them are dramatic and extraordinary.  
22 There are no single-digit rate increases anywhere in the  
23 record that are predicted by anyone.

24 In addition to health plans, local employers are  
25 concerned about the competitive harm for this transaction.



1 Slide 38 has a bunch of them. I'll just read a couple because  
2 obviously you can read them, Your Honor.

3 One very large employer. "I'm concerned that  
4 ProMedica's acquisition of St. Luke's will lead to higher  
5 healthcare costs for our employees in the Toledo area."

6 Another one. "I am concerned that ProMedica's  
7 acquisition of St. Luke's will enable it to demand higher  
8 rates."

9 So there is -- there are documents in St. Luke's and  
10 ProMedica that talk about higher rates, health plans expect  
11 higher rates, local employers expect higher rates. This is  
12 the type of evidence that on top of the already strong,  
13 irrebuttable presumption we are bringing forth in a 13(b)  
14 proceeding, where we're only required to raise serious  
15 substantial questions.

16 So I think it's pretty clear, we hope it is, Your  
17 Honor, that market shares do matter and that market shares are  
18 a very strong predictor of pricing by hospitals in Lucas  
19 County.

20 So it seems like what the Defendant argues next is  
21 that St. Luke's and ProMedica, they're really not close  
22 substitutes. They're not vigorous competitors, in the hope  
23 that even though ProMedica acquired St. Luke's, as long as  
24 they don't acquire a vigorous close competitor, there  
25 shouldn't be any issue.

1 Well, again, Your Honor, the documents that St.  
2 Luke's and ProMedica created not for this Court, but while  
3 they're running their business, belie that point. [REDACTED]

4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED] This is done, again, during the  
10 ordinary course of business.

11 And also, ProMedica and St. Luke's compete vigorously  
12 for the same patients. Again, really right around St. Luke's  
13 primary service area, a core service area as they define it.  
14 Based on market share data on zip codes that ProMedica's  
15 expert put forth, it's clear that ProMedica and St. Luke's  
16 have the top two general acute care market shares in eight of  
17 St. Luke's top 10 zip codes. In these zip codes Mercy is much  
18 smaller. Patients in that area prefer to go to either St.  
19 Luke's or ProMedica hospitals. They're the number one and two  
20 choices, and that's why it's important for health plan  
21 networks to have either one in the network.

22 This is, again, St. Luke's core service area. St.  
23 Luke's calculated market shares not for this review of the  
24 Court but in the ordinary course of business, as well. And in  
25 their calculations, ProMedica and St. Luke's market shares are

1 substantially higher than Mercy for both general acute care  
2 and obstetrics, and I have the PX numbers there, as well.

3 In all but one zip code in this area, ProMedica and  
4 St. Luke's were first and second by market share.

5 And, again, in an ordinary course document by [REDACTED],  
6 they define the southwest Lucas County area, and they  
7 acknowledge -- this was not made for litigation. They  
8 acknowledge that their presence in southwest Lucas County is  
9 significantly smaller than ProMedica and St. Luke's, having  
10 almost an 80 percent share for ProMedica and St. Luke's, with  
11 [REDACTED] and [REDACTED] much smaller. And Mr. Wakeman acknowledged  
12 that ProMedica was the most significant competitor of St.  
13 Luke's in the core service area.

14 ProMedica and St. Luke's compete and compete  
15 vigorously and compete for the same patients, especially in  
16 that area around St. Luke's, and that competition will be lost  
17 or is lost because of this acquisition.

18 There's also been a claim that St. Luke's just does  
19 nothing unique, they're not a significant competitor. We  
20 don't even really bother with them. We don't notice them.  
21 They're not doing well financially, and so they don't matter.  
22 And so if St. Luke's doesn't matter, the acquisition by  
23 ProMedica shouldn't matter. Again, this claim is belied by  
24 the evidence. ProMedica knew it was losing market share and  
25 revenues to St. Luke's. They knew it. They recognized that

1 in their documents. St. Luke's was stealing market share from  
2 ProMedica. ProMedica was very worried, which I'll talk about  
3 more, about St. Luke's readmission to Anthem for the simple  
4 reason, it would cost ProMedica millions of dollars.

5 Again, if St. Luke's wasn't significant, if they  
6 weren't a close substitute for many patients, adding St.  
7 Luke's into a health plan network should have had no or very  
8 little impact to ProMedica. Again, natural experiment  
9 evidence that ProMedica and St. Luke's were very close  
10 substitutes.

11 And ProMedica did not want Paramount to add St.  
12 Luke's to its network again for the very, very simple reason  
13 that if St. Luke's was added to Paramount, ProMedica hospitals  
14 would lose a significant amount of business. St. Luke's has  
15 the ability and has taken patients and share away from  
16 ProMedica, and that again is lost because of this acquisition.

17 And this is a environmental assessment document from  
18 ProMedica, 2010, very recent. ProMedica writes, in metro  
19 Toledo, ProMedica's share of the inpatient market declined [REDACTED]  
20 [REDACTED] through nine months of 2009, with St. Luke's hospital  
21 picking up [REDACTED].

22 And just so we're clear, that one percent share  
23 doesn't seem that impressive, that is millions of dollars.  
24 One percent of the inpatient market is millions of dollars,  
25 and that's what St. Luke's was stealing from ProMedica.

1           And when ProMedica notices this and says, really,  
2   what should we do about this, there are really two options.  
3   One is to improve the services at the ProMedica hospitals,  
4   improve patient satisfaction levels, improve amenities so you  
5   basically are giving these patients who are choosing St.  
6   Luke's a reason to go to ProMedica, or you can acquire your  
7   close competitor who is stealing share from you and then  
8   recapture a substantial portion of recent losses.

9           The first option benefits consumers, the second  
10   option doesn't.

11           And also, before we go on to the next document,  
12   ProMedica has claimed that St. Luke's is really an  
13   unattractive option. Look at their numbers, look at people  
14   who are going there. Patients weren't going there, they had  
15   low occupancy rates, there's nothing unique about them. There  
16   was nothing attractive about St. Luke's that would really  
17   compel or persuade a person to go there.

18           That, Your Honor, is again belied by the evidence.  
19   St. Luke's was stealing share, and ProMedica knew that if St.  
20   Luke's is included in the health plan network, patients who  
21   were choosing ProMedica would then go to St. Luke's, and  
22   that's what happened.

23           So St. Luke's was excluded from Anthem's network in  
24   2005 and readmitted in 2009. We're going to talk a fair  
25   amount about the steps, the extraordinary steps that ProMedica

1 took to make sure that St. Luke's wasn't added into Anthem's  
2 network. But ProMedica estimated that St. Luke's readmission  
3 to Anthem's network would cost, and it's on page 43, a  
4 significant sum of money.

5 St. Luke's market share in the core service area once  
6 [REDACTED] added St. Luke's to its network went up significantly  
7 by almost [REDACTED], while ProMedica's market  
8 share and in St. Luke's core service area declined. Mercy and  
9 UPMC shares stayed the same. Again, that shows closeness of  
10 competition, Your Honor. That shows vigorous competition.  
11 Patients who couldn't go to St. Luke's are going to ProMedica.  
12 Once [REDACTED] patients were allowed to choose St. Luke's and use  
13 them in that work, ProMedica lost significant share, St.  
14 Luke's gained significant share, and Mercy and UPMC's shares  
15 stayed the same.

16 St. Luke's was excluded from Paramount. Paramount  
17 is, of course, owned by ProMedica in 2001 and readmitted in  
18 2010. They're readmitted after this acquisition was  
19 consummated, not before.

20 ProMedica estimated that St. Luke's readmission into  
21 Paramount would reduce inpatient admissions by up to [REDACTED] per  
22 year at the other ProMedica hospitals.

23 And it's interesting to note, Your Honor, that by  
24 adding St. Luke's to the Paramount network, UPMC would only  
25 lose [REDACTED] by this projection, admissions a year. In Wood

1 County, [REDACTED]. [REDACTED]. So when St. Luke's is added to  
2 Paramount, ProMedica lost by far the most number of inpatient  
3 business. UPMC, a fraction of that, and Wood County [REDACTED].  
4 And, again, these are projections based right before -- right  
5 before ProMedica, Paramount added St. Luke's.

6 THE COURT: Would you go back one?

7 Okay. Thank you.

8 MR. REILLY: And this loss of admissions by adding  
9 St. Luke's to Paramount was a big concern for ProMedica  
10 executives. They knew by adding St. Luke's into the Paramount  
11 network ProMedica would lose share, would lose business, St.  
12 Luke's would gain.

13 You do not see this. You do not expect this to  
14 happen if St. Luke's is an insignificant, meaningless,  
15 irrelevant hospital, or if it's not located in an area where  
16 both St. Luke and ProMedica are vigorously fighting for  
17 patients.

18 And one thing I thought was very interesting in the  
19 same document, PX40-008, was also estimated that by Paramount  
20 adding St. Luke's to its network, Paramount's enrollment could  
21 upper bound increase by [REDACTED]. And, again, that's very  
22 interesting if you do believe, as the Defendants claim, that  
23 St. Luke's isn't meaningful, they're insignificant. Just that  
24 act alone of adding St. Luke's to Paramount's network would  
25 cause people to switch to Paramount because now they have

1 access to St. Luke's. Again, a vibrant, high quality, low  
2 cost hospital that was independent and now is part of the  
3 dominant system in Lucas County.

4 One thing that I think surprised many of us was when  
5 you see a very large system with a very large market share  
6 like ProMedica, if you look at the St. Luke's documents, you  
7 see a lot of references to ProMedica. They're fixated and  
8 focused on the dominant firm, the 800-pound gorilla, as they  
9 say.

10 And you look at the large systems documents or look  
11 at their actions, you really do see that the large system  
12 really isn't that concerned, or ignores, it doesn't even  
13 notice the small independent competitor.

14 Here, Your Honor, it literally is amazing how much  
15 ProMedica fixated on St. Luke's, sought to have them excluded  
16 from health plans, not just one health plan, several health  
17 plans, and really took all these actions to make sure that St.  
18 Luke's wasn't in health plan networks, because, again, St.  
19 Luke's had the ability and did take business and patients from  
20 ProMedica.

21 ProMedica charged a tax to health plans, meaning if  
22 you added St. Luke's to your network, we're going to charge  
23 you to do that, charge higher rates. And then, of course, we  
24 talked about ProMedica refused to allow Paramount to include  
25 St. Luke's in its network for the simple reason that they



1 would lose business.

2 ProMedica engaged in a prolonged and sustained effort  
3 to keep St. Luke's out of [REDACTED]. And this is clear in the  
4 documents. They did not want St. Luke's in the [REDACTED] network  
5 and have to compete with them on a level playing field.

6 This is a ProMedica-[REDACTED] 2008 letter of agreement.  
7 ProMedica writes in the letter of agreement, [REDACTED] will not  
8 add any participating network hospital provider located in  
9 western Lucas County. And if they do, they'd have to pay an  
10 additional 2.5 percent. That's what ProMedica did to make  
11 sure that St. Luke's wasn't in [REDACTED] network. They didn't  
12 want them in there, again, because of its location and its  
13 ability to compete against ProMedica, it would steal business  
14 and steal share from ProMedica.

15 In this document I think, Your Honor, from [REDACTED]  
16 [REDACTED], I think speaks  
17 volumes, because ProMedica has said to this Court in papers,  
18 and will likely say, that these health plans are very large,  
19 they have all the leverage, they tell us what rates they want  
20 us to charge, and we charge them. The health plans have all  
21 the power.

22 Well, if they do, one would wonder why ProMedica  
23 already has extraordinary rates today, much higher than any  
24 other hospital in Lucas County. But this is what ProMedica  
25 writes about [REDACTED], a very large health plan. [REDACTED] cannot

1 sign up St. Luke's until January 1st, 2009.

2 THE COURT: I think you misread that.

3 MR. REILLY: [REDACTED] cannot sign up St. Luke's until,  
4 I'm sorry, July 1st, 2009, and will have to pay ProMedica for  
5 the privilege. So if [REDACTED] wants to add St. Luke's into its  
6 network, ProMedica wrote that [REDACTED] would have to pay  
7 ProMedica for the privilege.

8 That doesn't sound like all-powerful health plans to  
9 me, Your Honor.

10 Just so there's no ambiguity, why did ProMedica want  
11 St. Luke's excluded from the [REDACTED] network? It says it right  
12 here in this document: Toledo network to exclude St. Luke's,  
13 and increase in market share. No St. Luke's means ProMedica  
14 has more and more business and higher market share.

15 MR. MARX: Your Honor, I don't want to interrupt  
16 Mr. Reilly, but I do want to note that some of these documents  
17 that we're publicly displaying were submitted by ProMedica and  
18 by St. Luke's for confidential designation, and in that  
19 respect should be treated as such. Unless we waive the  
20 privilege, I don't think the FTC should be disclosing some of  
21 that information publicly.

22 THE COURT: I'd like to have you indicate over --  
23 jointly, if you can, over the noon hour, which of those  
24 documents they are, and I will make an appropriate open court  
25 order --

1 MR. MARX: Thank you.

2 THE COURT: -- that they not be used outside of this  
3 hearing by anyone other than the Court.

4 MR. MARX: Thank you, Your Honor.

5 MR. REILLY: Going to slide 50.

6 ProMedica --

7 You actually can take that slide off just in case, I  
8 don't know.

9 ProMedica had told [REDACTED] that if they added St.  
10 Luke's to the network, that was a deal breaker. If they  
11 didn't delay 18 months, that was a deal breaker. Little  
12 insignificant St. Luke's, the inclusion of them in the [REDACTED]  
13 network was so important to ProMedica, or the exclusion was so  
14 important to ProMedica, that ProMedica called [REDACTED] adding  
15 them a deal breaker.

16 Again, Your Honor, St. Luke's is a very important,  
17 very significant close competitor to ProMedica. ProMedica  
18 knew that, and they acted accordingly, to make sure that they  
19 got the upper hand.

20 Slide 51, Your Honor. This testimony from a health  
21 plan that confirms once again that the motivation for  
22 excluding St. Luke's from the network was ProMedica's loss of  
23 volume. That's what they were concerned about, and this has  
24 been treated confidentiality, so I'm putting that excerpt in  
25 there for you to read and not putting on the screen.

1           So in addition to [REDACTED], ProMedica also sought  
2       exclusions of St. Luke's from [REDACTED] and [REDACTED], as well. It's  
3       not just one health plan, it's three separate health plans  
4       that ProMedica did not want St. Luke's in the network.

5           He wrote, ProMedica would like to see St. Luke's out  
6       of the [REDACTED] network. ProMedica indicated that would be an  
7       advantage to them. An advantage to them, of course, would be  
8       they wouldn't have to compete on a level playing field with  
9       St. Luke's, and ProMedica would not be losing share and  
10      patients to St. Luke's, evidence of close competition.

11          Same with [REDACTED], Your Honor. Determine opportunity  
12      for St. Luke's exclusion and OP services exclusion, a  
13      ProMedica document.

14          And St. Luke's didn't have its head in the sand, Your  
15      Honor. ProMedica's fixation on St. Luke's was not a secret.  
16      St. Luke's knew exactly what was going on and they wrote,  
17      slide 55, ProMedica desires the St. Luke's geographic service  
18      area, so they will continue to starve St. Luke's through  
19      exclusive managed care contracts and owned physicians. St.  
20      Luke's knew what ProMedica was up to and knew they had a plan  
21      of fixation on them, and St. Luke's expressed a lot of  
22      frustration about that because they were wanting to compete  
23      against ProMedica.

24          ProMedica leadership also refused to give Paramount  
25      members access to St. Luke's. We talked about this before.

1 I'm going to go through a few of the documents on this.

2 It was clear that Paramount leaders wanted St. Luke's  
3 in. This is a St. Luke's presentation. And ProMedica leaders  
4 wanted to keep St. Luke's out. Paramount will only let us  
5 back in under certain conditions.

6 So as we talked about it, just to reiterate,  
7 Paramount leaders, by adding St. Luke's, would have a more  
8 attractive network. They would be adding a hospital that a  
9 lot of people like to go to because of its very high quality  
10 and patient satisfaction levels. ProMedica did not want  
11 Paramount to add St. Luke's because of the loss of business to  
12 ProMedica.

13 And St. Luke's believed that Paramount would only let  
14 them back in when we give them the keys, meaning that they  
15 give St. Luke's -- ProMedica acquires St. Luke's, and that's  
16 what had to happen before St. Luke's was added back into  
17 Paramount.

18 Do you want to take a break now, Your Honor?

19 THE COURT: Is this a good breaking point for you?

20 MR. REILLY: Absolutely.

21 THE COURT: All right. Ten, 15 minutes.

22 (A recess was taken from 10:30 a.m. to 10:46 a.m., after  
23 which the following proceedings were had:)

24 THE COURT: Please proceed, Mr. Reilly.

25 MR. REILLY: Thank you, Your Honor.

1           So we're on slide 59. In the interest of time, I  
2     think I have made a few cuts from the slides, so I will say  
3     the slide number to an extent, not for a while that I skipped  
4     some. Maybe I won't have to.

5           So St. Luke's had a view of ProMedica that was quite  
6     different than what they're presenting to this Court in  
7     affidavits and in testimony and depositions.

8           In 2007, St. Luke's considered an antitrust suit  
9     against ProMedica in response to the aggressive competitive  
10    tactics. One document from St. Luke's basically said, the  
11    antitrust lawsuit's an option, look into it. St. Luke's knew  
12    they were being excluded by ProMedica from networks, knew that  
13    they were harming their business volume because they could not  
14    compete on a level playing field for patients, and they're  
15    reviewing all their options.

16          Slide 60. In St. Luke's true view, ProMedica --  
17    St. Luke's knew that ProMedica had an aggressive strategy to  
18    take over St. Luke's or put them out of business. There's  
19    nothing about saving St. Luke's in that document, Your Honor.

20          And this is not confidential. Slide 61, there was  
21    a -- St. Luke's true view of ProMedica at the Perrysburg  
22    Chamber of Commerce, in October 2008, Mr. Wakeman, CEO of  
23    St. Luke's, made this statement.

24          This is public notes from a speech. If we are going  
25    to use the competitive model in healthcare to provide the best

1 value to employers and consumers, then we should compete on  
2 price, quality and service, not on how well you can lock out  
3 hospitals and other healthcare providers from health insurance  
4 networks. Would you want Pepsi and Coke to use their clout  
5 with grocery store chains to keep a better tasting, lower  
6 price soda pop from being on the shelf for your purchasing and  
7 consumption, if you choose?

8 Just so it's clear, there is no evidence in the  
9 record whatsoever, Your Honor, that Mercy did anything to  
10 exclude St. Luke's from the networks, unlike ProMedica.  
11 There's nothing in the record. In fact, as we'll talk about  
12 later, Mercy knew that it needed St. Luke's in the network to  
13 make sure that health plan network had adequate coverage in  
14 the Lucas County area. And we're going to talk about that.

15 At the same time, Mercy had such a small share in the  
16 southwest Lucas County, that excluding St. Luke's would just  
17 benefit ProMedica. So Mercy wasn't being altruistic, they  
18 just knew there's no reason to even try to exclude St. Luke's.  
19 All the exclusion, when they have the Pepsi-Coke analogy, was  
20 done by ProMedica against St. Luke's.

21 Again, we're not condemning this. In some ways it's  
22 vigorous, vigorous competition. But don't come into this  
23 court and say, Your Honor, St. Luke's meaningless,  
24 insignificant, we'll really didn't compete against them.  
25 ProMedica was fixated on St. Luke's and did everything they

1 could to make sure that they weren't included in health plan  
2 networks.

3 Page 62, December 2008 document from Mr. Wakeman, he  
4 writes: The hospital that has added the greatest value to the  
5 community in terms of cost outcomes is the one that has lost  
6 the most money. That's St. Luke's. The organization has  
7 taken the greatest resources from the community, made the best  
8 bottom line and performs poorly in terms of cost and outcomes,  
9 which is, according to Mr. Wakeman in his deposition,  
10 ProMedica. That was St. Luke's views of ProMedica prior to  
11 entering this joinder. And this was a mere year, a mere year  
12 before agreeing to an exclusive due diligence period with  
13 ProMedica.

14 So it's a fair question for this Court to ask, and  
15 even if you didn't ask it, I'm going to answer it. So why did  
16 St. Luke's choose ProMedica? St. Luke's, you look through the  
17 documents, seems to have some concern for the community, was  
18 aware, very aware of what was likely to happen to health plan  
19 rates at St. Luke's by joining ProMedica, and so why would  
20 they do it?

21 It's very clear, Your Honor. St. Luke's chose  
22 ProMedica. They had other options. [REDACTED] wanted an exclusive  
23 due diligence period, [REDACTED] wanted an exclusive due diligence  
24 period. St. Luke's chose ProMedica, and the question is why,  
25 especially when they're fully cognizant of the impact on the



1 community and employers, employers and employees through  
2 higher rates.

3 And the answer is pretty simple. Joining  
4 ProMedica -- or at least one of the answers, sure would make  
5 life much easier right now for St. Luke's. Extraordinary  
6 rates on health plan contracts, no longer having to compete  
7 against a very large dominant system that had a constant  
8 bull's eye on St. Luke's back. It makes life easier. It's  
9 not easy for St. Luke's, an independent hospital, to compete  
10 against someone with that much market power who's fixated on  
11 them. And that is indisputable, that it was much easier for  
12 St. Luke's, rather than competing against them, which they  
13 were doing, to join, become part of the dominant system rather  
14 than compete against it.

15 There's also concern about retaliation. And this is,  
16 again, not a theory we're making up. St. Luke's fear that if  
17 ProMedica -- St. Luke's fear of retaliation from ProMedica if  
18 it affiliated with another partner. Choosing ProMedica would  
19 reduce or eliminate significant ProMedica actions that are  
20 bound to happen if St. Luke's partners with Mercy or UPMC.

21 When Mr. Wakeman was asked about that, he just  
22 explained, ProMedica had a reputation of being aggressive in  
23 the market.

24 And this is what St. Luke's told their board. If  
25 they chose someone else other than ProMedica, ProMedica would

1 have a scorched earth response, a scorched earth response, if  
2 they chose another partner besides ProMedica.

3 In another colorful document, an e-mail from  
4 Mr. Wakeman, the wrath of Alan Brass, former CEO of ProMedica,  
5 would come down from us -- from ProMedica. St. Luke's was  
6 afraid if they made a decision to go with any other partner,  
7 that there'd be significant retaliation from ProMedica. They  
8 told the board that, they told their board that when the board  
9 was in the process of making a very important decision. So  
10 coming in saying we had no choices, no one else wanted us,  
11 this was necessary, there was a real fear of retaliation from  
12 ProMedica if, in fact, they did, for example, choose UTMC.

13 Slide 68.

14 So we have focused a lot this morning on what happens  
15 to St. Luke's bargaining power and bargaining leverage now  
16 that they're part of a system that has 60 percent market share  
17 in general acute care services, 80 percent market share in  
18 obstetrics, and now is part of the system that has enjoyed the  
19 highest rates in Lucas County.

20 We don't stop there, Your Honor. There's also a  
21 concern founded in the evidence that ProMedica's negotiating  
22 leverage already at very phenomenal levels, will increase even  
23 further, and we'll explain why.

24 Bargaining leverage of hospitals versus health plans  
25 are determined really through bilateral negotiations. Each

1 side's leverage is determined by its importance or value to  
2 the other side. It's a very large hospital system that has a  
3 lot of hospitals nearby, negotiating with a health plan. That  
4 health plan really wants them in the network, and if they  
5 don't have them in the network, that health plan is going to  
6 suffer the consequences from lost business and lost volume.  
7 So that hospital system has a lot of leverage.

8 On the other hand, if the health plan has a lot of  
9 members, they can offer a hospital tens of thousands, hundreds  
10 of thousands of covered lives, then that health plan has  
11 relatively more leverage than other small health plans because  
12 a hospital that can't reach an agreement with that health plan  
13 is going to lose a significant amount of business because that  
14 health plan controls a lot of covered lives.

15 That is the crux, that is the foundation of how these  
16 prices or rates are determined between health plans and  
17 hospitals.

18 ProMedica, an already expensive health system, now  
19 becomes even more of a must-have system and can extract even  
20 higher rates by adding St. Luke's to its family of hospitals  
21 into Lucas County. We'll explain why.

22 To counter -- slide 69. To counter all the evidence  
23 relating to ProMedica's increased dominance and marketing  
24 clout, Defendant states that a Mercy-UTMC health plan network  
25 would be just fine, that if a health plan had to put together

1 a network of just Mercy and UTMC, that network would be fine,  
2 you could still say no to ProMedica, you wouldn't have to  
3 agree to even more exorbitant rates. And so that is a  
4 constraint on ProMedica after this acquisition.

5 But the interesting thing is and the informative  
6 thing and the telling thing is, Your Honor, that a network of  
7 just Mercy and UTMC has never been offered in Lucas County.  
8 It has never been offered.

9 This is to Mr. Wachsman. To your knowledge, has any  
10 payor ever excluded both ProMedica and St. Luke's from their  
11 network at the same time? Not to my knowledge.

12 As a result of this acquisition, health plans now  
13 must agree to ProMedica's rates or offer an unprecedented  
14 network of just Mercy and UTMC. And so not only has it been  
15 offered before, no health plan thinks it's viable, no health  
16 plan has said, yeah, we could run with that. We could offer a  
17 network of Mercy and UTMC and it would be successful, it would  
18 be attractive, it would grow in members. There's nothing in  
19 the record, despite all of the affidavits and testimony from  
20 health plans that say, yeah, that's a network we can market  
21 and be successful.

22 And because now, if you don't say yes to ProMedica,  
23 that's the network you're stuck with, that's the network you  
24 have to offer, you're going to be much more willing to accept  
25 ProMedica's rate increases and rate demands.

1           And this is an important -- this is an important  
2 fact, Your Honor, that this relates right back to the fact  
3 that ProMedica and St. Luke's are very close competitors,  
4 especially in that southwest portion of Lucas County.

5           They're the number one and number two choice based on  
6 surveys, based on market shares. And employers know and  
7 health plans know that you have to at least offer employers  
8 and employees a number one and number two choice, not a  
9 hospital like Mercy-UTMC in that area that has significantly  
10 smaller share which directly correlates to the preference.

11           And, again, we are not saying that a UTMC-Mercy  
12 health plan network that would deny medical care to Lucas  
13 County. No. The question is, is it sufficiently attractive  
14 even though it's never been done before, that a health plan  
15 could say no to ProMedica's rate demands and still have a  
16 successful, attractive growing network.

17           THE COURT: Well, your view would be that it would be  
18 especially true in OB?

19           MR. REILLY: Especially true, excuse me, Your Honor?

20           THE COURT: In OB?

21           MR. REILLY: Yeah, in OB, as we talked about a survey  
22 we put up there, that's absolutely true, that, again, the  
23 survey that St. Luke's did while they're running the business,  
24 it showed for obstetric services, and I'll get you the slide  
25 if you want, that ProMedica and St. Luke's hospitals are the

1 number one, number two and number three choice, meaning  
2 St. Luke's, TTH and Flower, for those patients who live there  
3 in obstetrics. So for obstetrics, with ProMedica's  
4 80 percent-plus share, it would be particularly true, as well.

5 And so on slide 70, Your Honor, we've put forth the  
6 testimony from health plans, and I would say testimony that is  
7 entirely un-rebutted at this point, about how difficult it  
8 would be to offer a commercially attractive successful network  
9 in Lucas County with just UTMC and Mercy.

10 Page 70. I will not say the name of the health plan,  
11 page 70. We cannot create a viable hospital network in Lucas  
12 County for our local clients that consists of only UT and  
13 Mercy.

14 Slide 71, Your Honor, more health plan testimony,  
15 un-rebutted. I won't say the name of the health plan. It  
16 would be exponentially more difficult to market a network in  
17 Lucas County without ProMedica and St. Luke's.

18 Slide 72, Your Honor. There's a good reason why  
19 health plans believe this. And it's very telling that to the  
20 extent that UTMC and Mercy would be a viable health plan  
21 network, that there's not one example, at least in the last 10  
22 years, by any other health plan who offered it, and there's  
23 not one health plan who says, yeah, that would be a network  
24 that I could really grow and be successful.

25 And the reason why is because employers, employers

1 have testified, slide 72, that that network of just UTMC and  
2 Mercy would result in very unhappy employees, and it would not  
3 be acceptable. And I'll just read a couple.

4 First one. A health plan with a network that  
5 excluded ProMedica and St. Luke's would not be a viable  
6 alternative for our Toledo area employees because it would  
7 force many of our employees to go to unfamiliar,  
8 inconveniently located providers who are not their first  
9 choice for care.

10 Then another one, the second one, the last one I'll  
11 read: A network that included only UTMC and Mercy Hospitals  
12 would be untenable to our employees.

13 Health plans have to be responsive to employees and  
14 employers, and this is what employers are testifying to about  
15 their employees' preferences.

16 Slide 73, another health plan. And it's made it very  
17 clear that the addition of St. Luke's into the ProMedica  
18 network has increased ProMedica's bargaining power. And I'll  
19 read from this.

20 Because of location and the addition of size, when  
21 you mention location, what specifically are you referring to?

22 There's no other hospital in the southwest corner of  
23 Toledo community hospital. So everyone in that whole area, it  
24 just gives them a lot more leverage because they have -- St.  
25 Luke's corridor, the whole southern Maumee area.

1 Another health plan testimony that is again  
2 un-rebutted, slide 74, the joinder would absolutely make it  
3 harder, absolutely make it harder to serve its membership in  
4 Lucas County without ProMedica.

5 Slide 76, we expect and it still might occur, that  
6 the Defendant may try to characterize this proceeding as  
7 nonprofit hospitals versus health plans. And putting aside  
8 that St. Luke's document makes it clear that higher rates will  
9 stick it to employers and health plans, employers who are  
10 worse off, that expense will be borne in part by the  
11 employees.

12 So this isn't an issue about health plans having a  
13 less favorable bottom line if rates increase at Lucas County  
14 hospitals. In fact, 70 percent of Lucas County employers are  
15 self-insured, 70 percent. Health plans negotiate rates, but  
16 any cost increases are borne directly by employers and  
17 employees. That means higher premiums, higher co-pays, higher  
18 out-of-pocket costs for those who are already struggling,  
19 these important services. And also higher healthcare costs  
20 means residents either have to give up medical care, delay  
21 services or even not afford insurance. The cost of the higher  
22 rates that will result from this transaction are not borne by  
23 the for-profit health plans, they are borne by the employer  
24 and the employees, and that is not in dispute.

25 Slide 77. Again, several local employers have



1 testified what are the consequences of higher healthcare  
2 costs. And just reading the last one, PX2054, many of this  
3 employers' employees live paycheck to paycheck and simply do  
4 not have the ability to absorb higher healthcare costs.  
5 That's what at stake here, Your Honor, in this preliminary  
6 proceeding.

7           Seventy-eight.

8           I'm not sure if the Defendant is contesting this  
9 point, but just in case they are, I'd like to make it. There  
10 has been some sentiment in past hospital merger cases that  
11 there should be no concern about mergers between two nonprofit  
12 hospitals because nonprofit hospitals don't fully exploit  
13 their market power. Sure, they could charge more, but they  
14 don't. They constrain themselves, they just charge as much as  
15 they need to cover cost. And we know that that is not true,  
16 and there is overwhelming evidence that in Lucas County,  
17 ProMedica is particularly aggressive in seeking the highest  
18 rates possible.

19           It's not just ProMedica. They're very aggressive,  
20 but other nonprofit hospitals do this, as well. And Lucas  
21 County, going back to the earlier slide we showed on market  
22 shares and pricing levels, higher market shares in Lucas  
23 County means higher prices. It's that simple. That's what it  
24 means.

25           Seventy-nine.

1 THE COURT: Well, is there also not the opportunity  
2 for shifting of costs? And by that I mean that the  
3 wholly-owned entity which offers insurance products in the  
4 healthcare industry to have -- be able to reduce its premiums  
5 by reducing the costs of the healthcare through its  
6 controlling shareholder? Have you followed?

7 MR. REILLY: Yeah, can I see if I understand your  
8 question? If so, I'll answer it.

9 Is your question does -- are you referring to  
10 ProMedica's ownership of Paramount and whether ProMedica will  
11 give Paramount favorable rates? If not, I didn't  
12 understand --

13 THE COURT: Yeah -- no, no, absolutely. And I'm not  
14 afraid. I said: Is that another issue which affects the  
15 market?

16 MR. REILLY: Absolutely. There's another issue.  
17 What happens when ProMedica is negotiating with health plans?  
18 And, again this is clear in the documents, is that they of  
19 course want to get the highest rates possible, and we have  
20 some testimony that makes that crystal clear.

21 But typically, if a large hospital system does not  
22 reach an agreement with a third-party health plan, that  
23 hospital loses all that volume. But in many -- but in many  
24 ways, if that health plan now, the third-party health plan,  
25 becomes less attractive, that benefits their own health plan.

1 Because if ProMedica, especially after this acquisition where  
2 the other health plans have to say yes to ProMedica's rate  
3 demands or I'm going to offer an unprecedented, never been  
4 offered network. So if they no to ProMedica's health demands,  
5 what happens is their network becomes significantly less  
6 attractive and people who offer ProMedica hospitals, like  
7 Paramount, they become more profitable.

8 And honestly, some people -- some health plans have  
9 testified that they would consider exiting Lucas County if  
10 they only have a UPMC-Mercy network because they don't think  
11 it's going to work.

12 THE COURT: I'm sorry, you could have just answered  
13 me and said, Judge, give me a few minutes, I'll get to it. It  
14 wouldn't offend me.

15 MR. REILLY: It's okay.

16 So, Your Honor, we had not -- our primary focus of  
17 this investigation is not ProMedica's ownership of Paramount.  
18 To be honest with you, in a 13(b) proceeding, with such a very  
19 strong presumption and two separate markets, with all the  
20 additional testimony and evidence and ordinary course  
21 documents that support our theory, we're not going to spend a  
22 lot of time on this. But we wanted to flag it and say, yeah,  
23 this does complicate and this does make the already incredibly  
24 high risk of anticompetitive harm even greater.

25 Can you go back to 79, please?

1           And this is slide 79, Your Honor. It's indisputable,  
2   every health plan has said, yeah, nonprofit hospitals always  
3   seek the highest reimbursement rates possible, consistent  
4   across every health plan testimony there.

5           Go ahead. Eighty.

6           Their own expert, Ms. Guerin-Calvert, conceded that  
7   ProMedica will exercise its full market power.

8           I'll read the second question: Are you aware of  
9   ProMedica ever saying to any health plan, that's too much?

10          I have never heard of -- there may be an exception,  
11   but I do not recall any medium -- small, medium or large  
12   hospital ever saying, please, no, it's too much.

13          Mr. Oostra, CEO of ProMedica, says, we try to  
14   maximize our revenue and reduce expenses.

15          For what purpose?

16          Well, in the case of our revenue enhancement, we want  
17   to make sure that for managed care companies, that we're  
18   getting the revenue we're entitled to, you know, in case of  
19   expense reduction, we're trying to reduce expenses in order  
20   that we can get a decent operating margin so we can continue  
21   to exist as an organization.

22          Then Mr. Oostra was asked, is ProMedica happy with  
23   the rates they have with managed care organizations?

24          No, we would always like more.

25          So, Your Honor, it's non dispute. If ProMedica, as a

1 result of its acquisition, has greater negotiating clout with  
2 health plans, they will fully exercise it, as they are doing  
3 now, as they are doing now, getting extraordinary rates in  
4 Lucas County relative to other hospitals, and they will do  
5 that in the future. The nonprofit status of ProMedica does  
6 not factor into this analysis at all.

7 Slide 85.

8 So what is the Defendant's response to this  
9 overwhelming evidence of harm? Well, as I understand it, and  
10 I'm sure Mr. Marx will say it a lot more eloquently than me,  
11 it's either an independent St. Luke's can increase rates to  
12 the same levels as ProMedica can, or ProMedica can raise rates  
13 higher than an independent St. Luke's can, but they won't.

14 The second point on the "or" Your Honor is exactly  
15 what we're talking about. If ProMedica can raise rates higher  
16 than St. Luke's, they will. So let's focus on the first  
17 point, an independent St. Luke's can increase rates to the  
18 same levels that ProMedica can.

19 Where is that in the record? No one health plan  
20 believes that. St. Luke's documents didn't believe that,  
21 ProMedica's documents didn't believe that. There's no  
22 evidence in the record that that's the case, that rates were  
23 going to go up anyways at St. Luke's, they will go up to the  
24 same level independent or with ProMedica. No support in the  
25 record for that.

1           Your Honor, when ProMedica's presenting to potential  
2 partners and they're talking about increased payor system  
3 leverage, they don't say, join us and you get increased payor  
4 system leverage or stay independent and you'll have the same.

5           When St. Luke's recommended to their board, if we  
6 join ProMedica we'll have extraordinary marketing -- managed  
7 care clout and access to outstanding contracts. They didn't  
8 say, if we stay independent we'll have the exact same rates.  
9 The market share pricing chart shows that St. Luke's and  
10 ProMedica's leverage is not even close to being the same. So  
11 ProMedica, by acquiring St. Luke's, and that was the intent of  
12 St. Luke's, and that was the design that ProMedica knew was  
13 going to happen, has the ability to charge significantly  
14 phenomenally higher rates than St. Luke's ever could,  
15 independently.

16           So to the extent that St. Luke's was seeking modest  
17 rate increases by doing a much better job marketing  
18 themselves, making it clear that you don't have to be the  
19 biggest to be the best, that's great, that's competition.  
20 They should sit down with health plans and get those rates.  
21 But to even imply, without any support in the record, that an  
22 independent St. Luke's could enjoy the exact same rates as  
23 self-proclaimed dominant ProMedica, that's not true, Your  
24 Honor, and there's no support in the record.

25           We also made the point that excess capacity in Lucas

1 County will constrain any ProMedica post-acquisition rate  
2 increases. And I guess the question I have, Your Honor, is  
3 when does this excess capacity start constraining ProMedica?  
4 When? Health plans are already telling Mr. Oostra that they  
5 have some of the highest rates in all of Ohio. There's been  
6 excess capacity now, excess capacity the last three years  
7 under the way they're measuring it. There's no evidence that  
8 excess capacity lowered rates.

9 The rates are very reasonable, that ProMedica,  
10 because its excess capacity, can't get significantly higher  
11 rates than St. Luke's and UTMC and Mercy. This excess  
12 capacity is a tool that is available now to the extent it  
13 really could constrain ProMedica, and there's no evidence that  
14 excess capacity exists today, that existed the last three  
15 years had any impact, any constraining impact on ProMedica's  
16 rates, but that's what they want you to rely on, excess  
17 capacity will save the day.

18 They also claim, they being ProMedica -- I guess I  
19 should use singular rather than plural -- health plans can  
20 steer patients to non-ProMedica hospitals to defeat a price  
21 increase. Meaning that you have a tier network, meaning if  
22 you go to one hospital like Mercy-UTMC you'd pay a lower rate,  
23 if you go to the ProMedica hospitals, you pay a higher rate.

24 Again, Your Honor, there's no evidence except for  
25 Mercy employees, who, Mercy, since they were a hospital,

1 wanted their employees to go to the hospital, that no employer  
2 has relied on and no health plan has relied on steering in the  
3 past. It just doesn't happen in Lucas County.

4 And, again, if these health plans had some incredible  
5 constraining tools in their arsenal right now that they could  
6 use to get someone like ProMedica to lower their rates, why  
7 aren't they using it now? If steering really was going to  
8 save the day and in these incredibly highly concentrated  
9 markets, in a merger to duopoly in obstetrics and there's some  
10 tool that health plans could use to get lower rates today, why  
11 aren't they using it? They're not using it because it's not a  
12 viable feasible option, and steering is not going to save the  
13 day.

14 Eighty-six.

15 As I think I mentioned to you during the TRO hearing,  
16 it's often the case when we see large systems acquiring  
17 independent hospitals, that the claim and the argument that we  
18 hear right out of the gate is, we're doing this to improve the  
19 quality at the small independent hospital. And then we look  
20 at the numbers and we see, yeah, the independent quality  
21 numbers look like the independent hospital are not up to par,  
22 that they're not high quality, and this big system has a track  
23 record of acquiring lower quality hospitals and improving  
24 them. That's what we often see.

25 Here, we see the opposite, Your Honor. We see



1 St. Luke's, and this is not in dispute, as a very high-  
2 quality, very low-cost hospital, top 10 percent of hospitals  
3 nationally, great patient satisfaction numbers, great outcome  
4 numbers. St. Luke's quality is already and has been and would  
5 continue to be as an independent hospital outstanding.

6 And this chart was put in the board of directors  
7 report to St. Luke's talking about an affiliation.

8 Can you do the arrows?

9 That St. Luke's where, in that quadrant low cost,  
10 high quality, where the quality on the vertical axis is better  
11 the higher you are and the lower cost, that side.

12 Show where Toledo is.

13 That's Toledo Hospital, and that's Flower Hospital.

14 This was done, again, presented to the board of  
15 directors at St. Luke's when they were considering who to  
16 partner with. This wasn't some chart that we made for this  
17 proceeding, this wasn't some chart that we made for the merits  
18 trial that's ongoing. This chart was in St. Luke's documents  
19 and shows St. Luke's compared to the ProMedica hospitals to be  
20 significantly higher quality and significantly lower cost.

21 Eighty-nine.

22 And rather than St. Luke's saying to their board, our  
23 executives and board members, saying, this acquisition is  
24 great, it will improve the quality of St. Luke's, the opposite  
25 happened. St. Luke's board members and executives were

1 concerned. They were concerned. They were worried about the  
2 acquisition's negative impact on the quality of St. Luke's.  
3 Mr. Wakeman acknowledged in his deposition, board members and  
4 he himself were concerned that by joining a lower quality  
5 health system, St. Luke's quality would decline.

6 And we share those concerns, Your Honor. This is not  
7 an acquisition where, by acquiring a low quality independent  
8 hospital, this high-quality system will then increase and  
9 improve St. Luke's quality.

10 Slide 90.

11 This is a reference of Mr. Oostra writing to  
12 Ms. Stelle, Ms. Barbara Stelle, another executive at  
13 ProMedica.

14 Mr. Oostra writes: We see subpar-quality scores when  
15 we look at published comparisons. We continue to hear how  
16 hard it is to send patients to us. We hear from payors that  
17 we are among the most expensive in Ohio.

18 Again, consistent with what Professor Town found, as  
19 well.

20 And Ms. Stelle writes: Randy, you are absolutely  
21 correct.

22 And so I think if I understand their improved quality  
23 claims as talking about better coordinating care across three  
24 hospitals, and now four hospitals, by having four hospitals in  
25 one geographic market, we will be able to coordinate care

1 better, and that would be a big benefit in the quality at all  
2 the hospitals, I guess the question I'd like this Court to  
3 consider is, if owning multiple hospitals in a -- in the same  
4 geographic market was really a benefit to the quality scores,  
5 why, in all the years that ProMedica has had TTH, has had  
6 Flower, and has had Bay Park, why wouldn't they have been able  
7 to do all of this coordination of care and create sense of  
8 excellence, why aren't ProMedica's current quality scores far  
9 and above St. Luke's?

10 If being able to coordinate care across multiple  
11 hospitals was really going to result in higher quality, why  
12 haven't we seen it in the three hospitals they've owned in the  
13 last several years? Is hospital number four the magic number?  
14 Is now by adding St. Luke's and having four hospitals to give  
15 quality care in one region is that going to now drastically  
16 improve quality, when we have seen no evidence of that.

17 Slide 91.

18 So I'm going to go through -- I'm really done with  
19 what we call our case in chief, talking about the incredibly  
20 high market shares in two separate markets, talking about the  
21 presumption, very strong presumption, widely recognized by  
22 courts in the merger guidelines, the duopoly in obstetrical  
23 services markets, and I've reviewed a portion, but a fairly  
24 significant amount of ordinary course documents and testimony  
25 from a wide array of market participants that all predict

1 dramatic 80 price increases.

2 And so the question remains, what can the Defendant  
3 do to rebut this evidence, rebut the presumption and also  
4 strengthened presumption by all the evidence that we have put  
5 forth in this 13(b) proceeding, where all we have to raise is  
6 serious substantial questions to prevail.

7 So we think there are probably three potential  
8 defenses: Entry conditions. Entry must be timely, likely,  
9 sufficient to overcome harm; efficiencies, merger-specific  
10 efficiencies that outweigh anticompetitive harm. They have to  
11 outweigh the anticompetitive harm here. They can't just point  
12 to some efficiencies and say, okay, we get to approve our  
13 merger under the antitrust laws. And then other defenses,  
14 like failing firms.

15 The most important to take away from this is none of  
16 these defenses, or any other defense, rebuts the strong  
17 presumption or outweighs the likely harm here.

18 Can we jump to 96? If we have time I'll go back to  
19 entry. I don't see the Defendant pushing entry nearly as much  
20 as some of the other arguments. It's pretty clear from the  
21 documents, from the testimony that new entry is not occurring  
22 in Lucas County. Their own expert claims that Lucas County is  
23 over-bedded. That's not the sort of community that you're  
24 going to start building new hospitals.

25 So I'm going to focus more on the efficiencies.

1 According to the D.C. Circuit in the Heinz case, efficiencies  
2 must be extraordinary, extraordinary to overcome high  
3 concentration levels. We have high concentration levels here.  
4 If the Defendant has any chance of prevailing, they have to  
5 point to extraordinary market -- extraordinary efficiencies.

6 And just do a summary of what our expert's analysis  
7 of their efficiencies showed, they're not true cost savings,  
8 the efficiencies claimed by ProMedica are not merger specific,  
9 they're unsubstantiated, they're speculative, and they're made  
10 for litigation.

11 And a lot of times I'll explain to you what I mean by  
12 made for litigation. We suspect that sometimes but we never  
13 see evidence of it. We have seen explicit evidence of that in  
14 this case, and we'll talk about that.

15 And before I move on, I want to point out there's  
16 been several experts in this case. We presented three, they  
17 have one. Our expert, Mr. Gabe Dagen, did a full  
18 comprehensive efficiencies analysis and looked at all the  
19 claimed efficiencies by ProMedica and reached his conclusions  
20 that are exactly what I outlined in those bullets.

21 Their expert, Ms. Guerin-Calvert, did not do an  
22 efficiencies analysis. So we have one expert who did one and  
23 one who did not, and these are our conclusions from our  
24 expert.

25 Sorry about that, Your Honor. I'm trying to cut some

1 slides to get within the time.

2 THE COURT: That's all right.

3 MR. REILLY: The efficiency claims are not credible.

4 Here is what ProMedica has said about the  
5 efficiencies either in testimony or in their documents.  
6 They're largely guesswork. They represent a first pass at the  
7 efficiencies. The efficiencies are based on a gut feeling,  
8 that there must be some efficiencies there, there must be.  
9 Gut feeling. And estimates are preliminary and subject to  
10 further analysis, revision and substantiation.

11 Those are the type of rigor they brought to these  
12 efficiencies analysis. When they talk to this Court about how  
13 these efficiencies are so likely and substantial, remember the  
14 type of rigor that went into the analysis.

15 During Mr. Oostra in an investigational hearing, if  
16 the claimed efficiencies proved unobtainable, ProMedica would  
17 just find other efficiencies. So the list of efficiencies, if  
18 they don't pass, if they fall by the wayside, they will find  
19 more. Again, not the type of rigor necessary in any merger  
20 analysis case, especially one here with such a strong  
21 presumption and so much evidence of likely competitive harm.

22 And this was the one I was referring to, Your Honor.  
23 This is an e-mail, internal e-mail of ProMedica. Unfavorable  
24 response from Compass Lexicon. Haven't accomplished enough in  
25 savings. We will need to be more aggressive with the timeline

1 of the first three to five years. FTC -- and that's us, Your  
2 Honor. FTC discounts value of each year the farther out you  
3 go.

4 They were designed to persuade us, and when it didn't  
5 work I think they've been designed to persuade you, and I can  
6 tell you how I hope that goes. But they literally have said  
7 the FTC, you better discount those less because you can't go  
8 further out. That's what we're going to want to see. It  
9 wasn't an analysis of what can we truly get and what can we  
10 expect, what does the FTC want to see. And if you come up  
11 with an analysis and report that the FTC doesn't want to see,  
12 go back and change it.

13 Just to put some context about how extraordinary the  
14 efficiencies they must demonstrate, ProMedica has the burden  
15 of showing efficiencies must be, Philadelphia National Bank,  
16 Supreme Court, where a merger substantially lessens  
17 competition, it is not saved because, on some ultimate  
18 reckoning of social or economic debits or credits, it may be  
19 deemed beneficial.

20 In another Supreme Court case, Proctor and Gamble,  
21 possible economies, and economies there meaning economies of  
22 scale, efficiencies cannot be used as a defense to legality  
23 because Congress was aware that some mergers that lessen  
24 competition may also result in economies but it struck the  
25 balance in favor of protecting consumers.

Slide 102.

Another defense that the Defendants may put forth is a failing firm defense. We talked a little bit about this at the TRO hearing. The failing firm defense is very narrow and imposes a very high burden on the Defendant. And, again, Your Honor, the Defendant has the burden of showing that they meet the failing firm defense.

The failing firm has strict limits according to the Ninth Circuit in the case in front of you. And General Dynamics called the failing firm defense, the lesser of two evils. It's a pretty intuitive case, Your Honor.

If you were to let a dominant firm such as ProMedica acquire a hospital and become even more dominant, or you let that hospital exit the market. They're going to close their doors and stop taking patients. In that scenario you let the self-proclaimed dominant firm become more dominant rather than let them close it. That's what the purpose of the failing firm defense is.

Again, Your Honor, it's very important to remember that if they do present a failing firm defense, this has never succeeded in any 13(b) proceeding. They're going to ask you to do something that has never been done, if they're putting forth a failing firm defense.

Slide 103. The Defendant must meet two prongs.

There must be a grave possibility of imminent failure, and no



1 alternative purchasers existed. Those are the two prongs, and  
2 ProMedica fails both.

3 An unfortunate fact for this defense or even the  
4 flailing firm defense that we talk about, that on all  
5 important financial indicators St. Luke's was trending  
6 upwards. In the first eight months of 2010, St. Luke's was  
7 trending upwards on growth, on revenue, on capacity  
8 utilization, on operating cash flow margin, or EBITDA, and on  
9 market share. They're all going up.

10 We have seen failing firm hospitals, Your Honor. We  
11 have accepted this defense in our investigations, and they  
12 looked nothing like St. Luke's did. When we see -- when we  
13 put these indications up on the graph, we see the death  
14 spiral, we see downward trends throughout, and that's when we  
15 say, yeah, this failing firm defense is legitimate.

16 Here, St. Luke's on every important trend was going  
17 in the right direction, not only the numbers show that, their  
18 documents show that as well, and including the documents of  
19 representations made to the board of directors.

20 And again, St. Luke's failed to pursue less harmful  
21 alternatives. They had UTMC, who was very interested in  
22 affiliating with St. Luke's, and we'll talk about that more  
23 later.

24 And under the failing firm, there can be no other  
25 alternative. St. Luke's said no to UTMC, not the other way

1 around.

2 Page 104. Even less likely to succeed is what the  
3 courts have termed the weakest defense, flailing firm. This  
4 is the Seventh Circuit. Case law is highly skeptical.  
5 Financial weakness is probably the weakest ground of all for  
6 justifying a merger. It certainly cannot be the primary  
7 justification of a merger.

8 A weak company defense would expand the failing  
9 company doctrine, a defense which has strict limits.

10 And I will tell you what they have to show on the  
11 flailing firm if they want you to credit that. The critical  
12 question, this is the critical question, and we have the case  
13 law from the Eleventh Circuit to show where it came from, and  
14 there's other cases, as well.

15 Can ProMedica show that St. Luke's alleged weakness  
16 is so significant that it rebuts the presumption of harm? And  
17 that's what University Health says, that a hospital merger  
18 case requires a substantial showing that the acquired firm's  
19 weakness, which cannot be resolved by any competitive means,  
20 would cause the firm's market share to reduce to a level that  
21 would undermine the Government's prima facie case. That's  
22 what they need. Can they show that St. Luke's market shares  
23 were likely to decrease so dramatically, were likely to  
24 plummet, that then they can rebut the very strong presumption  
25 in this case in two markets, not just one.

1           So let's see what that means. What do you have to  
2 find is a reasonable approximation of what St. Luke's shares  
3 would have done absent this transaction.

4           So right before 2010, Your Honor, that is St. Luke's  
5 market share for both general acute care services and  
6 obstetrics. As you can tell from 2008, 2009, 2010, they're  
7 growing, they're increasing.

8           Mr. Wakeman, the CEO who was brought in to turn  
9 around St. Luke's, who had successfully turned around three  
10 other independent hospitals, had put in a plan, we'll talk  
11 about this later, and it was working. Their share was  
12 growing, their revenue was growing, their occupancy rate was  
13 increasing, and this is what it looked like.

14           In order for the Defendant here to have you credit a  
15 failing firm -- flailing firm -- excuse me -- to say, yeah,  
16 they can rebut the presumption, here's what has to happen to  
17 St. Luke's market shares. For general acute care services,  
18 St. Luke's market share has to fall from 11.5 to 2 percent.  
19 For obstetrics, it has to fall from 9.3 to 1.3 percent.  
20 That's the dramatic fall in market share that they have to  
21 convince you will happen in order to rebut the presumption  
22 under flailing firm.

23           And, Your Honor, I promise you I know they think  
24 we've gotten millions of pages, documents we probably have.  
25 There's not one document that even closely resembles this in

1 St. Luke's documents. There's no representations made to the  
2 board. There is nothing. There's no saying, wow, our market  
3 share's grown significantly over the last two years. I hope  
4 it doesn't plummet to 1.5. I think our market share will  
5 plummet to 1.5 to two percent. There's nothing. It's a made  
6 for litigation argument with no support in the documents and  
7 no support in the testimony.

8 Page 108, slide 108.

9 As I had already referenced, St. Luke's is in the  
10 middle of a very successful three-year turnaround plan. They  
11 hired Mr. Wakeman, who is affectionately called by us a  
12 hospital turnaround expert, in 2008. And Mr. Wakeman  
13 immediately saw a huge potential in St. Luke's because a  
14 decline in revenue, in itself, in an area where you have  
15 growth means opportunity. He created and executed a  
16 turnaround plan to improve the hospital's financial  
17 performance.

18 Before Mr. Wakeman got there, St. Luke's, to his  
19 knowledge, had never had a one-year strategic plan. He came  
20 up with an aggressive three-year turnaround plan with  
21 aggressive goals and objectives, and he met those goals and  
22 objectives.

23 So here's his three-year growth plan, increase  
24 inpatient net revenue by 10.5 million. He was hoping to do  
25 that by 2011. He -- I should say St. Luke's. It was a team

1 effort, I'm sure. Accomplished April 2009.

2 Increase outpatient net revenue by 15 million;  
3 accomplished April 2009, way ahead of schedule. Increase OP  
4 ratio from 40 percent -- outpatient ratio, from 40 percent to  
5 60 percent. Got up to 47 percent by August 2010.

6 Physician alignment strategy, accomplished.

7 Ninety percent managed care access, fell short in  
8 July 2009. Hit 83 percent, but because Paramount refused to  
9 add St. Luke's to his network, it wasn't able to meet that  
10 goal.

11 And then 40 percent inpatient market share in the  
12 core service area, they hit 43 percent by 2010. They hit all  
13 of their goals on this very aggressive, very ambitious  
14 three-year plan.

15 And the results were very telling and showed  
16 significant progress. Net patient revenue in 2007 were  
17 127 million. By 2010, [REDACTED]. Market share, core  
18 service area, 34.1 percent in 2007. 43 percent, 2010. And  
19 also had a lot of physicians on the staff.

20 Mr. Wakeman acknowledged that the three-year plan was  
21 successful. St. Luke's had substantial cash and reserves  
22 totaling [REDACTED] on August 31st, 2010, right before the  
23 acquisition here. And the market rebound eased a lot of the  
24 financial stress on St. Luke's after the 2008 financial  
25 crisis. Of course, the 2008 financial crisis didn't just

1 impact St. Luke's, it impacted a lot of businesses around the  
2 country, including St. Luke's, and the rebound in the markets  
3 has improved significantly their financial progress.

4 They're paying bills and debt obligations on time and  
5 making necessary capital improvements, and they're attracting  
6 a growing number of patients. And they now have a positive  
7 operating cash flow margin, or they did right before the  
8 joinder. An incredible, dramatic improvement in operating  
9 cash flow margin from negative [REDACTED] in 2009 to positive  
10 [REDACTED] as of August 31st, 2010, right before the joinder.  
11 This came in Ms. Hanley's declaration and Mr. Wakeman's  
12 deposition and declaration. Dramatic improvement in operating  
13 cash flow margin or EBITDA.

14 Historically high revenues. The point there is where  
15 Mr. Wakeman became CEO and you see what has happened to  
16 revenues since he came on.

17 And this is the operating cash flow margin put in  
18 graphically. As you can tell in 2007, it was positive. It  
19 then went down significantly in 2009, by the end of 2009, and  
20 then that is a dramatic improvement in operating cash flow  
21 margin, positive [REDACTED], is it, in 2010 for the first eight  
22 months, right before the joinder.

23 If that trend continued going downward, if revenue  
24 was going downward, capacity utilization, market share, all  
25 those things, then maybe, maybe ProMedica could put together a

1 failing firm or even a very, very difficult flailing firm  
2 defense. These types of progress, these types of financial  
3 improvements, these trends upwards are devastating to both  
4 their failing firm and their flailing firm defense.

5 We've also seen in ProMedica's submission to this  
6 Court and also their expert reports about St. Luke's really,  
7 really low occupancy rates. It's a sign that they're not  
8 significant, they're not unique. It's a sign, ProMedica says,  
9 that no one wants to go there. They don't do anything  
10 special, and they're not -- they can't fill their beds.

11 Well, you should look at more recent data. From data  
12 from 2008, that might have been true. Actually, it wouldn't  
13 have been as bad as they said if they had used the right  
14 number of staff beds, but this is what we see is happening in  
15 2010 at the time that the acquisition with ProMedica was  
16 consummated.

17 Mr. Wakeman to the board: In the past three years we  
18 went from an organization with declining activity to near  
19 capacity.

20 Mr. Wakeman to the board again: We are at capacity  
21 for a number of days throughout the month. In 2010, our  
22 concern is burned out staff and lack of beds. Several service  
23 lines, and especially obstetrics have experienced great growth  
24 in the past two years.

25 Mr. Wakeman on capacity, we're pretty tight.

1 Letter to Ohio Department of Health: We're  
2 experiencing a surge in obstetrical patients at this time.  
3 Our maternity unit has been full with patients laboring,  
4 waiting in triage in the family birthing center waiting room  
5 because they desire to have their babies born at St. Luke's.

6 Mr. Oppenlander, St. Luke's former treasurer, noted  
7 that the hospital is close to capacity with inpatients. These  
8 are all coming at the time Mr. Wakeman implemented their plan.  
9 They're saying that St. Luke's has such low capacity  
10 utilization, that's a sign that they're failing, that's a sign  
11 that they're flailing. That's a sign that no one wants to go  
12 there. Not true, Your Honor. Look at the most recent data  
13 and documents that tell a very different story.

14 118.

15 So what does ProMedica do about the excellent  
16 financial progress, the trending upwards of virtually every  
17 significant financial number in 2010, the time period right  
18 before they stopped being an independent company? Well, I  
19 think they're arguing that St. Luke's improvement is the  
20 result of remedial and unsustainable decisions to freeze  
21 hiring and salaries and limit capital improvements in 2009 and  
22 2010.

23 That's not true, Your Honor. St. Luke's turnaround  
24 was due to sustainable improvements, increasing volume,  
25 increasing revenues, sound cost-cutting measures.



1           Contrary to ProMedica's assertions, St. Luke's  
2 actually increased FTEs each year since at least 2007. You  
3 can tell from 1122 in 2008 to 1277. And St. Luke's is the  
4 only hospital in Lucas County that did not lay off employees.  
5 This is not a hospital that's saying let's fire everyone and  
6 lay people off because we have to cut costs. They have not  
7 laid off employees, and they have grown.

8           Contrary to ProMedica's assertions, St. Luke's did  
9 not freeze capital expenditures in 2009 and 2010. They did  
10 not. St. Luke's spent at least 7.5 million on capital  
11 expenditures in those years. That's in Mr. Dagen's  
12 supplemental declaration.

13           And contrary to ProMedica's assertions, St. Luke's  
14 would not have cut service lines and employees absent this  
15 joinder, absent the acquisition. This was considered some  
16 period in spring. In August of 2009 it was presented to the  
17 board of directors about cutting unprofitable services and it  
18 was rejected. It was rejected based on the conclusion that  
19 St. Luke's would no longer be able to fulfill its current  
20 mission to fully serve the community. It was rejected.

21           And then even after it was rejected, St. Luke's  
22 senior executives presented more options to the board of  
23 directors, including remaining independent by talking about  
24 cutting services. That option was rejected, it wasn't  
25 revisited for at least a year before the joinder was

1 consummated. It wasn't a viable or threat that they were  
2 going to do, especially this was before -- especially in light  
3 of the outstanding financial progress and significant  
4 financial improvements they made prior to the joinder.

5 Also, Mr. Dagen's conservative projections show that  
6 St. Luke's could have achieved profitability without cutting  
7 services and employee levels. Again, that comes from our  
8 expert declaration, paragraph 57 through 65.

9 So remarkably, Your Honor, in 2009, 2010, St. Luke's  
10 took several cost-cutting measures, and yet still grew patient  
11 volumes and maintained the high levels of quality and patient  
12 satisfaction. Rather than saying, Your Honor, don't believe  
13 or just ignore the incredible progress that St. Luke's has  
14 made in 2010, ignore it or don't give it weight because they  
15 cut costs. But that's a sign of good business. That's a sign  
16 of an excellent management team. They were able to cut costs  
17 in an economic downturn and still produce an excellent,  
18 high-quality product with great patient satisfaction. So  
19 rather than using it as a source of criticism or taking weight  
20 away from evidence, they should be praised for that.

21 And not surprisingly during an economic downturn,  
22 both ProMedica and Mercy were also forced to cut costs and  
23 services in response to the 2008 financial downturn. They all  
24 did. Nonprofit hospitals across the country did.

25 I don't think anyone's arguing that ProMedica is

1 failing or Mercy's failing, yet they did the same thing.  
2 ProMedica froze new positions, cut staff, reduced  
3 discretionary spending, eliminated services, reduced employee  
4 benefits, all because of the economic downturn.

5 And Mercy -- that's redacted, Your Honor, but they  
6 took several that you can see in your slide 122, several  
7 cost-cutting measures that look, even for both ProMedica and  
8 Mercy, looked like they're even more aggressive cost cutting  
9 than St. Luke's did. So don't look at their cost cutting to  
10 say I'm going to discount their incredible financial progress,  
11 St. Luke's in 2010; everyone cut costs.

12 There's also been a lot of paper written about  
13 St. Luke's pension fund. ProMedica's expert called it  
14 unfunded in the first declaration and then it was changed to  
15 under-funded. And it was under-funded, Your Honor; it is not  
16 unfunded.

17 The facts.

18 In 2009, St. Luke's pension fund was 71 percent  
19 funded, on par with such failing companies such as ExxonMobil,  
20 CBS, Disney, and Motorola. A lot of companies, Your Honor, of  
21 incredible size, of financial reserves were facing similar  
22 pension issues because of the equities market's decline. It  
23 had nothing to do with St. Luke's. When the equity markets go  
24 down it becomes less funded, when they go up it becomes more  
25 funded.

1           And sure enough, in 2010, St. Luke's pension fund was  
2   76 percent funded.

3           And there's no risk. I want to make sure this is  
4   clear. There's no risk that retirees from St. Luke's aren't  
5   getting their pension money. There's no risk at all.  
6   St. Luke's has sufficient funds to pay this for decades.  
7   86 million in the fund that pays out about 3 million a year on  
8   average. That is not -- they are not going to run out of  
9   pension money for decades, Your Honor.

10          They also made a change to their pension fund,  
11   switched from a defined benefit plan to a defined contribution  
12   plan, which will minimize pension swings and equity market  
13   swings and cycles by doing the switch. So the pension issue  
14   in terms of being fully funded/not being funded should just  
15   decrease over time.

16          In terms of St. Luke's bond rating, there's been a  
17   lot of information put out about this as well. ProMedica in  
18   their filings calls the Baa credit rating just above junk bond  
19   status. We call it what Moody's calls it, Baa credit rating  
20   is investment grade. There's actually another notch that if  
21   St. Luke's went down, there would still be investment grade.  
22   St. Luke's credit rating is investment grade according to the  
23   official Moody's definition.

24          28 percent of Moody's hospital and this comes from  
25   Mr. Brick, are in this category. Similarly rated hospitals

1 had plenty of access to the debt markets. They borrowed  
2 \$2.6 billion from January 2010 to January 2011. And  
3 St. Luke's is better positioned in many categories, low debt  
4 load, being that their cash to debt ratio was, by many fold,  
5 better than the average hospital for Baa rating.

6 And this total bond size was, compared to their cash  
7 reserves, was fairly low. They had the ability at any time  
8 and they were contemplating this, paying off the bond in its  
9 entirety. You see in St. Luke's documents contemplating this  
10 because they had large cash reserves and a small bond debt,  
11 and they could have paid it off.

12 In terms of the bond rating, there are several  
13 factors. And, again, Mr. Brick offers an expert opinion on  
14 this, that could change your rating up, continue growth and  
15 stability of inpatient and outpatient volume trends,  
16 significantly improved and sustainable operating performance  
17 for multiple years, improve market share, strengthening of  
18 debt coverage measures and liquidity balance. All of these  
19 are trends up that would likely improve, not result in further  
20 downgrades to St. Luke's bond rating.

21 It's really important for this Court to remember,  
22 St. Luke's has never, never been late or failed to make a  
23 payment on its bonds. They are never late. And Mr. Wakeman  
24 called the bond payment the equivalent of a car payment. Only  
25 in this court in this proceeding has this bond rating and bond

1 taken on larger than life measures. It was a car payment.  
2 According to Mr. Wakeman prior to this proceeding starting and  
3 getting in front of you.

4 So I'm not, unfortunately, going to end, but I'm  
5 going to -- last word for now on St. Luke's financial progress  
6 and the great work that they have done, especially in the  
7 first eight months of 2010. This is Mr. Wakeman's last words  
8 to the board on behalf of the independent St. Luke's. In many  
9 ways, Your Honor, this is frozen in time. There will never  
10 be -- I shouldn't say never. An independent CEO no longer  
11 exists at St. Luke's, they're part of ProMedica. This is  
12 Mr. Wakeman's last words to the board of directors, where, of  
13 course, Mr. Wakeman always provides accurate information to  
14 the board. He said so, and you would not expect otherwise.

15 Inpatient up 7.5 percent, outpatient up 6.1 percent,  
16 activity is running hot all month. While we still have  
17 capacity for outpatient, especially in the offsite centers,  
18 inpatient capacity is limited, except for weekends. The high  
19 activity produced a positive operating margin of [REDACTED]  
20 [REDACTED] in gross revenue. That's not impressive, but  
21 it's better than a loss. The positive margin confirms that we  
22 can run in the black if activity stays high. After much work,  
23 we have built our volume up to a point where we can produce an  
24 operating margin and keep our variable expenses under control.

25 Continues, same memo to the board of directors. The

1 entire St. Luke's family has much to be proud of with the  
2 accomplishments in the past three years. We went from an  
3 organization with declining activity to near capacity. Our  
4 leadership status in quality, service and low cost stayed  
5 firmly in place. In the past six months, our financial  
6 performance has improved significantly. Has improved  
7 significantly. The volume increase and awareness of expense  
8 control were key.

9 Those are the words of Mr. Wakeman to the board of  
10 directors right before the joinder in a matter, in a  
11 preliminary matter where the Defendant is pushing failing and  
12 flailing firm and making St. Luke's financial situation,  
13 trying to make it center of this analysis.

14 Slide 132.

15 Okay. In their pretrial brief, Defendants claim that  
16 there have been a string of hospital merger cases in the past  
17 that both DOJ and FTC lost that also had a very strong  
18 presumption. I'm not going to contest that the DOJ and FTC  
19 lost hospital cases in the past, Your Honor. That I'll  
20 stipulate to. But they're absolutely wrong. It is false that  
21 these hospitals, that the 13(b) preliminary relief was denied  
22 with a strong presumption in place. It's not true, and I'll  
23 tell you why.

24 The combined market shares in these cases are  
25 substantially smaller than this case, and the Government

1 didn't meet its burden. I mean, they cited some of these  
2 cases because we alleged a narrower geographic market, that  
3 the Court did not find for that. And there was no  
4 presumption. There's one case which I'm going to talk about  
5 where the Government had a presumption, a hospital merger  
6 case, and was not denied relief. Every other case where the  
7 presumption was in place, they won.

8 And, again, it's not in dispute that there is a  
9 presumption at least in general acute care market in this  
10 case, not in dispute.

11 So Mercy, yeah, DOJ alleged a combined share of  
12 86 percent, but the Court held the Government had not proven  
13 the relevant geographic market, so market share was only  
14 10 percent. There was no presumption in Mercy. The combined  
15 market share was 10 percent. Not relevant to this case, Your  
16 Honor.

17 FTC versus Tenet. Government alleged market shares  
18 based on 84 percent combined. Court held that the Government  
19 failed to prove geographic market, which the share was  
20 inaccurate. And if we didn't prove geographic market in this  
21 case, Your Honor, if we didn't put forth evidence to let you  
22 determine what it was, then we wouldn't have a presumption.  
23 But of course we did.

24 FTC versus Freeman. FTC alleged post-merger HHI of  
25 3088, but the Court held that geographic market was not



1 proven, and the post-merger HHI was 1322, compared to the HHIs  
2 in this case, Your Honor, and the combined shares of  
3 21-24 percent.

4 Again, as I point out, here the Defendant concedes  
5 that the Plaintiffs have established a presumption of  
6 competitive harm based on high market concentration levels.  
7 And the reason for this, again, Your Honor, to repeat myself,  
8 is simple. We have proven geographic market, we have met our  
9 burden in geographic market, if we have presented evidence  
10 that will lead this Court to believe that ProMedica could  
11 acquire Mercy, all the Mercy Hospitals in Lucas County, UTMC  
12 and St. Luke's and raise prices. And if we have shown that  
13 and if we have put forth all the evidence to prove this, then  
14 we're entitled to the presumption.

15 And, again, Your Honor, I'm not aware of one piece of  
16 evidence in this matter that contradicts the geographic market  
17 here. I'm not. The fact that ProMedica could acquire Mercy  
18 and UTMC and St. Luke's and not raise prices by five to  
19 10 percent, there's no evidence saying otherwise.

20 There is one exception -- I'm sorry, let me talk  
21 about Evanston. This is the last litigated hospital case.  
22 The post-merger HHI was just over 3000, and because it was a  
23 consummated deal, prices had already increased by 20 percent.  
24 So that was the last litigated hospital case, significantly  
25 less concentrated market, significant price increases.

1           The presumption matters, Your Honor, and we have not  
2 lost cases, except Butterworth, where there was a presumption  
3 in place.

4           So Butterworth is a case in the Sixth Circuit where  
5 the Defendant could point to and say there was a presumption  
6 there, and yet the FTC was denied preliminary relief. But I  
7 want to inform this Court the reasons that the Butterworth  
8 Court did this. The Court credited arguments that a nonprofit  
9 hospital was not likely to raise prices, in part because the  
10 local community board would not allow it. And the Court also  
11 relied on the hospital's commitment to freeze prices for three  
12 years and limit price increases for four years after that.

13           In terms of the first point, there was a sentiment  
14 that nonprofit hospitals don't exercise market power, that  
15 they're not going to charge as much as they can. The judge  
16 and the Court found there that that's what the evidence said.  
17 Here, Your Honor, it's not even in dispute. Mr. Oostra's  
18 testimony, health plan testimony, ProMedica's own experts'  
19 testimony. ProMedica, like other nonprofit hospitals, will  
20 fully exercise market power if they have it. The Court in  
21 Butterworth found differently. The evidence must have been  
22 different.

23           And you're not hearing anything in this court, nor  
24 will you, about pricing freezes or pricing caps. And the  
25 reason why the Defendants in Butterworth did that is because

1 they were saying we're confident that prices won't go up,  
2 prices won't go up, so we will agree to a pricing freeze, a  
3 pricing cap.

4 You're not going to hear that from ProMedica.  
5 ProMedica's telling this Court, yeah, prices are going to go  
6 up at St. Luke's. Of course they are. Totally different from  
7 Butterworth. We're talking about how high prices are going  
8 up.

9 THE COURT: What community was Butterworth in?

10 MR. REILLY: Grand Rapids, Michigan.

11 THE COURT: And it appears that there was a community  
12 board which at least controlled price increases.

13 MR. REILLY: Yeah. It's actually a very good -- even  
14 if it wasn't a good question, I'd tell you it was a very good  
15 question, Your Honor.

16 THE COURT: Thank you very much.

17 MR. REILLY: There was evidence in that case that the  
18 local community board was involved, seeing some of the rate  
19 increases, the rate suggestions. Also, there was a sentiment  
20 that because the local community board lives in the community,  
21 a CEO is in the community, they wouldn't want hospital rates  
22 to increase because it'd hurt their businesses.

23 And your question reminded me of another point. For  
24 ProMedica, when they negotiated rates with health plans, those  
25 rate negotiations, possible contracts, draft contracts never

1 go to the ProMedica board.

2 Mr. Oostra testified that he rarely sees them. Only  
3 in the rare exception. It doesn't go to the board. There's  
4 not this ProMedica board looking at, well, 40 percent price  
5 increases, give that a haircut. That's too much. Never. If  
6 they have evidence of that, ask them to see it because we  
7 haven't seen it. The ProMedica board does not offer a  
8 constraint or a limit of how much ProMedica would charge.

9 THE COURT: Well, so this local community board  
10 references to the Butterworth's board, not an outside communal  
11 board?

12 MR. REILLY: That's right.

13 THE COURT: Thank you.

14 MR. REILLY: Slide 135.

15 Let me mention another point that was in their  
16 pretrial brief. Since it's a fairly new point and we haven't  
17 responded to yet, we thought we would.

18 In their pretrial brief, ProMedica mentions the  
19 recent [REDACTED] negotiations as a sign that they will be  
20 reasonable, they will be fair, they won't raise rates too  
21 much. And that's what they're putting forth.

22 Actually, we have a strong disagreement with that  
23 conclusion. In fact, the [REDACTED] negotiations affirm why the  
24 proposed court order is necessary. Because ProMedica entered  
25 into a voluntary hold separate letter with us, [REDACTED] had

1 leverage and had a tool to constrain ProMedica that it  
2 wouldn't otherwise have. Under that letter, [REDACTED] could  
3 continue St. Luke's rates indefinitely. They had that option  
4 because of the voluntary hold separate letter.

5 The important constraint on dramatic price increases  
6 will evaporate without an order from this Court. That changes  
7 the leverage.

8 And also Your Honor, this comes from Hospital Corp of  
9 America, Judge Posner.

10 For ProMedica to point to recent results from the [REDACTED]  
11 negotiations and say, ah, look, we're fair and reasonable,  
12 they have two antitrust actions filed against them, one here  
13 and one in D.C.; they know we're watching.

14 And Judge Posner says it beautifully:  
15 Post-acquisition evidence that is subject to manipulation by  
16 the party seeking to use it is entitled to little or no  
17 weight.

18 I wouldn't put a very high probability that they're  
19 going to make these exorbitant demands from [REDACTED] right before  
20 we're seeing you or seeing Judge Chappell in D.C., Your Honor.

21 Slide 136.

22 There has been some mention in this case, especially  
23 by the Defendant, that St. Luke's needed to join with  
24 ProMedica because of healthcare reform. Healthcare reform is  
25 not a blank check for the self-proclaimed dominant firm to

1 become even more dominant, for the self-proclaimed dominant  
2 firm to acquire a very close significant vigorous competitor.  
3 It's not -- healthcare reform, depends on who you talk to.  
4 Everyone has a different opinion what it will look like, when  
5 it will be enacted, what the Courts will do with it. It  
6 cannot be at this stage saying healthcare reform, we get to  
7 have a merger to do all obstetrics. Healthcare reform, we get  
8 to have a 60 percent market share in general acute care  
9 services.

10 And that being said, it is indisputable that  
11 St. Luke's is a high-quality, low-cost provider. And as much  
12 as there are different opinions from everyone, I think there's  
13 pretty universal feeling that a high-quality, low-cost  
14 provider will do very well under proposed healthcare reform as  
15 incentives are put in place to have outcomes at a low cost.

16 And St. Luke's agreed. St. Luke's wrote: Is  
17 uniquely positioned for smooth transition to expected  
18 healthcare reform. The hospital already focuses on quality  
19 and cost; key components of reform. They thought they were in  
20 a very good situation to thrive under this new motto or do  
21 better than other hospitals, and I've seen nothing to change  
22 that, because, again, they are a high-quality, low-cost.

23 137.

24 So I'm going to summarize, of course, my view of what  
25 ProMedica has to ask this Court to accept in order to prevail,

1 and I respectfully suggest that they have to ask you to make  
2 history. This Court would have to approve uncontested  
3 double-digit rate increases in two relevant markets:

4 Allow HHI increases in the thousands;

5 Endorse a merger to duopoly for the first time ever  
6 in the 13(b) context, or in a merits trial, for that matter;

7 Sanction higher prices on the novel theory that  
8 current prices are too low. Your Honor, current prices are  
9 too low. ProMedica will decide what a fair rate is, not  
10 competition, ProMedica. And this is a novel theory, so we are  
11 anxious to get their brief and see what's the support for  
12 this. We didn't know of any case.

13 And the only case they cited was Long Island Jewish  
14 Memorial Hospital. I remember saying, that court didn't say  
15 prices are going up dramatically after an acquisition, but  
16 they're still fair, but they're still competitive. They  
17 didn't say that. In Long Island Jewish Memorial the Court  
18 said there's no evidence that prices will increase. So they  
19 can't cite Long Island Jewish Memorial for this novel theory.

20 Ask them. I don't know. Cite a case where the court  
21 said this merger will result in significantly higher prices,  
22 but that's okay because the prices are still fair. There are  
23 none. They're asking you to adopt a novel theory that has not  
24 been adopted by any other court on a merits trial, never mind  
25 a 13(b) preliminary setting.

1 Credit, for the first time in 13(b) history, a  
2 failing firm defense. Never been done. They're asking you to  
3 do that.

4 Deny preliminary relief on the equities. For the  
5 first time ever in 13(b), despite FTC showing of likelihood of  
6 success. If we show serious financial questions, every time  
7 the FTC has done that, they have always won on the equities.  
8 And they're asking you with all these equities thrown in, to  
9 deny relief, even though we raise serious substantial  
10 questions.

11 Accept an efficiencies defense to an otherwise  
12 clearly anticompetitive merger. Never been done. They're  
13 going to talk a lot about efficiencies, talk about how they  
14 offset the harm here. They're going to ask you to make  
15 history in that, as well, Your Honor. Absent a lot of history  
16 being made, I respectfully suggest to this Court that based on  
17 the presumption, based on the standard for 13(b), based on the  
18 incredible number of ordinary course documents that support  
19 our theory, out of the mouths of ProMedica and St. Luke's when  
20 they didn't know we were watching and didn't know you were  
21 watching, based on testimony from every health plan where they  
22 can't point to one health plan that says, this is good for the  
23 community, this is good for healthcare, based on the numerous,  
24 numerous employers who are concerned about this transaction  
25 and expressed concern and expressed how higher healthcare



1 costs affect them, based on testimony from third-party  
2 hospitals, based on five expert reports submitted to this  
3 Court, that has been, and I would like to say long before we  
4 got to that point, an incredible amount of evidence, combined  
5 with the presumption to have us raise serious substantial  
6 questions. And if we have done that, we are entitled to  
7 preliminary relief.

8 I'm going to talk about the preliminary relief.

9 How much time do I have?

10 THE COURT: Five.

11 MR. REILLY: Thank you, Your Honor.

12 THE COURT: Six, actually.

13 MR. REILLY: Slide 138.

14 I expect, I hope we'll be talking more about our  
15 proposed order tomorrow. I just want to make a few points now  
16 in my remaining six minutes, assuming it's not down to five.

17 The relief is necessary to maintain the status quo.  
18 We already talked about that. And the objectives of the  
19 proposed order are pretty clear, prevent dramatic and  
20 immediate price increases;

21 Preserve St. Luke's service lines and staffing  
22 levels, all of which ProMedica is contemplating cutting;

23 And ensure the availability of effective relief, if  
24 warranted, after the merits trial.

25 Those are the goals of the proposed order. And let's

1 be very clear. Absent preliminary relief, rates at St. Luke's  
2 will increase dramatically. After the TRO hearing, ProMedica  
3 asked us whether we'd be willing to modify one aspect of the  
4 voluntary hold separate letter. It wasn't, hey, we just want  
5 to make sure this voluntary hold separate letter allows us to  
6 make more investment in St. Luke's. We want to make sure that  
7 we can get more efficiencies. The one request they had was,  
8 we want to be able to notify health plans immediately,  
9 immediately, that if you rule against us, that they can  
10 renegotiate significantly higher rates from health plans.  
11 That was their one request that they wanted. They plan to  
12 raise rates immediately the minute that the voluntary hold  
13 separate letter doesn't apply or there's no order from this  
14 Court.

15 Again, the Commission finds that divestiture is  
16 warranted after the merits trial, the public is entitled to  
17 full effective remedy. That means reestablishing St. Luke's  
18 as a full-service community, with service lines and employees  
19 in place. ProMedica's contemplating consolidating service  
20 lines from St. Luke's. The Commission has a right and the  
21 public has a right after the merits trial to spin off or  
22 potentially divest the exact same hospital that was acquired  
23 through the joinder in terms of service lines, staffing  
24 levels. We don't want, it's not in the public's interest to  
25 have service lines consolidated and moved from St. Luke's to

1 Flower, Bay Park, TTH.

2 ProMedica argues that there's no relief necessary  
3 from this Court because a joinder agreement protects all the  
4 services and protects St. Luke's. Your Honor, the joinder  
5 agreement protects a handful of services. We're not exactly  
6 sure if, in fact, they did change the joinder agreement and  
7 start consolidating and moving services out of St. Luke's, who  
8 would enforce it? Would it be the St. Luke's hospital now  
9 owned by ProMedica would sue ProMedica? A potential lawsuit  
10 by a controlled entity against another entity cannot be a  
11 substitute for effective enforcement of the antitrust laws.

12 To the extent that ProMedica does intend to keep  
13 St. Luke's service lines exactly the same, does intend to keep  
14 St. Luke's staffing levels the same, then this order has no  
15 burden on them. If they're not going to do what -- if they  
16 weren't going to do anyways what we're asking for in the  
17 order, then enter the order and hopefully, we won't have to  
18 bother you again because they're going to keep the service  
19 lines and staffing levels intact. They've never said they're  
20 not going to jack up rates to health plans or employers at  
21 St. Luke's.

22 And let's be clear. ProMedica is considering  
23 consolidating moving service lines. Mr. Oostra said recently  
24 that they're considering consolidating service lines.  
25 Navigant is studying where service lines should be moved from

1 one hospital to the other. This isn't some theory that we're  
2 coming up with. They're actively and continuing looking at  
3 this.

4 So how does the proposed order relate to the  
5 voluntary hold separate order? The overriding objectives are  
6 the same. As we said, maintain the same service lines,  
7 staffing levels, same high-quality, low-cost model that made  
8 St. Luke's an invaluable asset to the community. Maintain the  
9 status quo while the merits trial runs its very quick pace.

10 But the letter agreement was also voluntary, had  
11 little specificity and didn't have independent oversight.  
12 Those are some things we're talking about and are asking for  
13 in the proposed order.

14 The hold separate proposed order that we put before  
15 this Court is very similar to dozens of hold separate  
16 agreements that companies have entered into with the FTC.  
17 They all appoint a monitor. A monitor's goal is to monitor,  
18 not to run the business. Not surprisingly in their pretrial  
19 brief, Defendant talked about all these extraordinary powers  
20 that the monitor has. Those are very -- those are  
21 extraordinary, rarely-used powers that in case the business  
22 starts going down, they have to be able to do something.

23 And, in fact, so rarely used, that in the last 30  
24 years, even though those types of powers in terms of cutting  
25 salaries by a monitor have been in hold separate agreements,

1 never been used. So by pointing to something that has  
2 virtually a tiny, tiny little probability of being used by a  
3 hold separate monitor and saying, look at this, it is a rare,  
4 rare, rare never used case that the monitor is going to use  
5 the powers in there.

6 And, again, there's a 13(b) case in the Central  
7 District of California where the FTC has asked for the Court  
8 to appoint a director to manage the held-separate businesses.  
9 We are not seeking a director here, Your Honor. We are not,  
10 for the very simple reason St. Luke's management team under  
11 Mr. Wakeman has implemented a successful dramatic three-year  
12 turnaround plan. All their numbers are improving. They said  
13 they've made significant financial progress. We want  
14 Mr. Wakeman and St. Luke's to run St. Luke's during the  
15 interim period of the order. That's -- we don't need a  
16 director to run it. They already have a great management team  
17 in place.

18 One last point. In their pretrial brief they said  
19 that the proposed order by you would limit ProMedica's  
20 investment in St. Luke's. Well, they already signed a joinder  
21 agreement that said they would invest 30 million. So in some  
22 ways they're saying the joinder agreement means that it's so  
23 ironclad you don't need an order, oh, on the other hand, we  
24 did commit to spending 30 million in the joinder agreement,  
25 but that's negotiable. It's in the joinder agreement.

1 There's nothing in our proposed order that limits ProMedica's  
2 ability to make investments in St. Luke's.

3 And notably, they didn't cite anything in our  
4 proposed order. They made a general statement. They want us  
5 to put -- you want us to put explicitly ProMedica can invest  
6 as much as it wants to in St. Luke's or invest what they've  
7 already committed, we'll put that in there.

8 They also claim that the proposed order prohibits  
9 St. Luke's inclusion in ProMedica Healthcare Obligated Group.  
10 Again, Your Honor, nowhere in the order. Not even a fair  
11 reading of the order implies that. If it would help, we would  
12 make that perfectly clear in the order that you think you are  
13 contemplating issuing, to make that perfectly clear. Those  
14 are things they're talking about they may do. The order was  
15 not designed nor does the clear language of the order say  
16 that's got to happen.

17 Nor does it impede coordination of care, Your Honor.  
18 We have an explicit statement in there saying the types of  
19 things that hospitals in the community do to better coordinate  
20 care, to form accountable care organizations, that can all  
21 happen, as well. That's all free to happen. The order does  
22 not prohibit that.

23 Again, Your Honor, I just want to, on my last point,  
24 say that the order is not for some three, four-year period.  
25 It is literally to maintain the status quo during the merits

1 trial. The ALJ, administrative law judge, Judge Chappell,  
2 will issue his opinion by the end of the year. We fully  
3 expect if we don't meet our burden and prevail on the merits  
4 trial, they will be coming running to you to say we have to  
5 revise this order, we have to eliminate this order, we won, we  
6 being ProMedica, in the merits trial, let's revisit this.

7 So we're not asking you to do something that's going  
8 to last for years. It's a short period of time while the  
9 Commission does its job in the first instance and conducts the  
10 merit trial to determine the merits of this case.

11 That's all I have, Your Honor, unless you have any  
12 questions.

13 THE COURT: I presume you will discuss this tomorrow,  
14 perhaps, but if one assumes for purposes of discussion only,  
15 that the Court does not issue any order that the joinder  
16 proceeds apace, that the order of the ALJ then goes in early  
17 2012 to the Commission, and from the Commission to the Sixth  
18 Circuit, we're talking a minimum of two years, the question  
19 I -- in that scenario, what do you see as the issues facing  
20 the unwinding of the transaction should the FTC ultimately  
21 prevail in the Sixth Circuit?

22 MR. REILLY: Uh-huh.

23 Would you like me to address that now or tomorrow,  
24 Your Honor?

25 THE COURT: Whichever you prefer.

1 MR. REILLY: Yeah, I'll just address it.

2 It would be significantly more challenging if -- and  
3 I really do hope as a hypothetical question, if you didn't  
4 issue your order and as is played out on the trial of the  
5 merits in front of the ALJ, appeal of the Commission and the  
6 Sixth Circuit, you're right, a significant amount of time will  
7 go by. And I think it's -- with certainty, the rates that  
8 employers are paying for healthcare at Lucas County would  
9 increase. We also think that it's very likely that service  
10 lines would be moved from St. Luke's. At that point it's  
11 really, we prevail on the merits trial, appeal to the  
12 Commission, the Commission decides what is effective relief.

13 I mentioned the Evanston case, because so much time  
14 had passed and there wasn't preliminary relief, a spinoff  
15 wasn't possible. There's too much integration. There's all  
16 this stuff going on. And that's the exact purpose of 13(b),  
17 Your Honor, is that it maintains effective relief if, in fact,  
18 we do prevail on the merits trial, if, in fact, we prevail in  
19 front of the Commission, and the Sixth Circuit, that's a lot  
20 of work to prove our case and go that far and then not have  
21 effective relief.

22 THE COURT: Thank you.

23 May I see you and David?

24 (Discussion held off the record.)

25 Ladies and gentlemen, we'll now break until 1:30. I



1 would intend to start very promptly so that we can vacate the  
2 premises for the benefit of the staff of this courthouse  
3 before 5:00 o'clock.

4 Thank you. Enjoy your lunch hour.

5 (A recess was taken from 12:22 p.m. to 1:28 p.m., after  
6 which the following proceedings were had:)

7 THE COURT: Thank you, ladies and gentlemen. Please  
8 be seated.

9 Ready, Mr. Marx?

10 MR. MARX: I am, Your Honor. Thank you very much.

11 Two preliminary matters, if I might?

12 THE COURT: Of course.

13 MR. MARX: I think we have an agreed statement for  
14 you if -- between the parties to -- relating to the documents  
15 that the Government was referring to this morning in terms of  
16 their confidentiality. That's the handwritten version that  
17 we've just provided to you. I apologize for the fact that we  
18 couldn't get it typed over lunchtime, but . . .

19 THE COURT: Very clear.

20 Let me read the order that I am putting in place now  
21 at 1:29. As I indicated this morning and I now incorporate it  
22 in this offer, to the extent that any confidential documents  
23 subject to the protective orders entered in this case were  
24 discussed in this morning session or may accidentally be  
25 discussed in this or tomorrow morning's session, the contents

1 of such documents shall not be discussed, disclosed or used  
2 outside the confines of this courtroom.

3 It is so ordered.

4 MR. MARX: Thank you, Your Honor.

5 Second point, I put a notebook just to the right of  
6 Cathy for Your Honor that has the slides to which we'll be  
7 referring this afternoon. I think they're organized like one  
8 through six today. So, for example, behind tab number 1 will  
9 be the few slides that I will be referring to, and as we  
10 rotate through this afternoon our presentation, we'll let you  
11 know where to find the other ones.

12 I also left a box, which you don't have to worry  
13 about this afternoon, to the right of Cathy on the chair.  
14 Those represent the three notebooks of Defendant's exhibits in  
15 connection with the preliminary injunction hearing, but you  
16 don't have to worry about those today, and we'll be happy to  
17 take those upstairs for you afterwards if you like.

18 THE COURT: Thank you.

19 MS. HANCOCK: Thank you, Your Honor. Before I begin  
20 the Defendant's presentation this afternoon, I would like to  
21 introduce some of the individuals who are here today  
22 representing ProMedica and St. Luke's.

23 First, Mr. Larry Peterson, who's the chairman of the  
24 board of ProMedica Health System, Your Honor. You may know  
25 some of these gentlemen and ladies.

1           Jamie Black, who is the chairman of the board of  
2           St. Luke's. Randy Oostra, who's the chief executive officer  
3           and president of ProMedica Health System. Jeff Kuhn, who's  
4           the chief legal officer of ProMedica. Marshall Bennett who --  
5           from Marshall & Melhorn, for whom we should have entered an  
6           appearance today on behalf of ProMedica this morning, but he  
7           was sort of behind us, and big as he is, it's my fault, I  
8           forgot to introduce him.

9           And Priya Bathija, the associate general counsel of  
10          ProMedica Health System is also here.

11          Your Honor, this joinder between ProMedica and  
12          St. Luke's couldn't have happened five years ago, and it  
13          probably couldn't even have happened three years ago. The  
14          simple truth is that the previous leadership of both  
15          institutions wouldn't have and couldn't have made this joinder  
16          transaction happen. Back then, St. Luke's, which has always  
17          been fiercely protective of its independence, probably  
18          wouldn't even have sat down with ProMedica to discuss a  
19          transaction like this one.

20          Why not? Well, we saw a couple of slides I think  
21          that provided a pretty good indication of why not this  
22          morning. You saw the slide where -- that indicated that  
23          ProMedica had a reputation of being aggressive in the market.  
24          You saw another slide that discussed the wrath of Alan Brass  
25          would have come down on us from ProMedica. Those documents I

1 think describe others' perception of ProMedica Health System  
2 and ProMedica's reputation in the marketplace.

3 In fact, the first two options that St. Luke's  
4 considered for partners were Mercy and the University of  
5 Toledo Medical Center.

6 Now, Mercy lost interest in St. Luke's because of  
7 St. Luke's troubled financial situation and a consultant's  
8 assessment that limited purpose joint ventures between  
9 St. Luke's and Mercy wouldn't be financially viable.

10 St. Luke's and UTMC danced around for a long time, but they  
11 never got very far, far enough in their discussions to pursue  
12 any meaningful due diligence. And that was one, one, but not  
13 the only reason that St. Luke's concluded that the fit with  
14 UTMC didn't seem right.

15 But, Your Honor, people and circumstances change.  
16 And when the discussions between Mercy and UTMC stalled,  
17 St. Luke's began to examine more closely the potential for an  
18 affiliation with ProMedica.

19 As an organization, ProMedica's personality changed  
20 when Randy Oostra became ProMedica's chief executive officer.  
21 And perhaps surprisingly to St. Luke's, when Dan Wakeman and  
22 Randy and their boards began to talk about a transaction,  
23 ProMedica and St. Luke's found they had more reasons to join  
24 than they might otherwise have expected. And we'll talk about  
25 those reasons over the course of the next couple of days.

1           Now, first, I want to address a couple of issues that  
2           Mr. Reilly raised this morning directly. This won't be the  
3           only time we address these issues, but I want to address a  
4           couple before we get too far along.

5           First, I want to affirmatively and unqualifiedly  
6           state that no matter what Dan Wakeman may have thought or  
7           hoped about how a joinder with ProMedica might affect  
8           St. Luke's ability to increase its reimbursement from  
9           commercial payors, and when I see his statements and I read  
10          them, the terms "irrational exuberance" come to mind.

11          ProMedica did not pursue this joinder with the  
12          purpose or intent of raising the rates it charges payors to  
13          treat their commercially insured members or employees. Let's  
14          be clear about something. High rates do not violate the  
15          antitrust laws. High prices are not per se unlawful. Never  
16          have been, never will be.

17          The fact that prices go up doesn't violate the  
18          antitrust laws either. The only time that higher prices  
19          violate the antitrust laws is when they reach supra  
20          competitive levels, when they achieve a level above a  
21          competitive price. But high prices in and of themselves  
22          aren't anticompetitive. And to the extent that ProMedica  
23          charges higher prices than other providers in Toledo, there's  
24          nothing wrong with that. It's not inherently unlawful.

25          THE COURT: It's usually just the reverse, isn't it?

1 MR. MARX: Yes, it is usually just the reverse. But  
2 as a practical matter, there's no evidence in this case either  
3 that the prices that ProMedica's charging are anticompetitive.

4 The FTC's economist, I asked him, do you have any  
5 evidence that the prices that ProMedica's charging in the  
6 marketplace are anticompetitive? No. Do you have any  
7 evidence that ProMedica has exercised whatever bargaining  
8 leverage or market power or whatever it is that you want to  
9 call it, do you have any evidence that ProMedica has exercised  
10 its size to achieve supra competitive prices, prices above the  
11 competitive market level?

12 Answer: No.

13 So whether or not ProMedica charges high prices now  
14 really is irrelevant. The issue is whether or not as a result  
15 of this transaction, ProMedica will be able to charge  
16 commercially -- commercial insurers prices above the  
17 competitive level, supra competitive prices.

18 In the Government's world, in the Government's world,  
19 they say if there's a merger and prices go up, we have an  
20 antitrust violation. That's simply not the law, and we'll  
21 take that on a little bit more as we proceed over the course  
22 of the next couple of days.

23 But there's not a shred of evidence to suggest that  
24 ProMedica will change its approach to managed care contracting  
25 for itself or for St. Luke's now that St. Luke's has joined

1 ProMedica Health System. Nor is there any evidence to support  
2 the notion that ProMedica could or would try to charge payors  
3 the rate for St. Luke's that ProMedica charges for its other  
4 Toledo Hospitals. There is no basis to suggest that  
5 ProMedica's prices for St. Luke's will go up by the 71 percent  
6 that Plaintiff's economist has suggested. There's simply no  
7 factual basis for it.

8 Now, we've heard a lot, we've heard a lot about  
9 Mr. Wakeman's statements and representations to the St. Luke's  
10 board. I probably missed it when Mr. Reilly mentioned it this  
11 morning in his presentation, but I certainly don't recall any  
12 citations to -- this morning to Mr. Wakeman's belated  
13 recognition, his "aha moment," if you will, that St. Luke's  
14 rates with its two largest commercial payors, MMO and Anthem,  
15 weren't covering St. Luke's cost of delivering care to those  
16 patients. It was that realization, and it came to Mr. Wakeman  
17 late, it came to him after all of his other turnaround tricks,  
18 if you will -- and I don't use that term pejoratively, but all  
19 of the steps that he had taken, and Ms. Carletti's going to  
20 talk some more about this in a little bit, he pursued them and  
21 there was still a problem. St. Luke's was still losing money.  
22 Couldn't figure out why. And the realization that he came to  
23 was that the rates that St. Luke's was charging MMO and Anthem  
24 weren't sufficient to cover the cost of care that they were  
25 delivering to their patients.

1           And when Mr. Wakeman realized that and he went to MMO  
2           and he went to Anthem and said we've got to renegotiate these  
3           rates because we're losing money hand over fist, and the trend  
4           is going down, not up, MMO and Anthem refused to renegotiate.  
5           They've said, we've got a contract, we're not going to  
6           renegotiate now.

7           And it was that -- at that point when it became clear  
8           to Mr. Wakeman and to the board at St. Luke's that they had to  
9           abandon any thought of remaining independent, and that's  
10          ultimately what led them to the joinder with ProMedica.

11          All of the evidence that's been adduced so far in  
12          this case shows that ProMedica will use the same methodology  
13          to negotiate with payors for St. Luke's that it uses with  
14          other -- for all of its hospitals.

15          And it's true that a recently negotiated contract  
16          between St. Luke's and MMO which ProMedica negotiated does  
17          provide for a rate increase for St. Luke's to be implemented  
18          over the four-year term of the contract. And I want to  
19          emphasize the four-year term of the contract.

20          But even after the rate increases have been  
21          implemented, MMO will still be paying St. Luke's less than  
22          Paramount, ProMedica's insurer, will be paying St. Luke's for  
23          St. Luke's participation in the Paramount network.

24          Now, the FTC suggests, not surprised, the FTC  
25          suggests that ProMedica has manipulated those negotiations



1 with MMO because we're meeting with you and because the FTC  
2 has filed this administrative complaint.

3 I said there was a four-year contract, and it is a  
4 four-year contract. And the reality is that the rates that  
5 ProMedica has negotiated with MMO that cover the course of  
6 that four-year contract are going to be in existence long  
7 after you've resolved this case for us and long after the FTC,  
8 and if we have to, the Sixth Circuit, has resolved it for us,  
9 as well. This is a four-year contract. We're stuck with  
10 these rates for four years. So if we manipulated them for  
11 purposes of producing evidence in these two cases, it's going  
12 to have a financial impact on us for four years. This was a  
13 hard-bargained contract, it wasn't manipulated.

14 Let me focus on another point quickly before I cede  
15 the day as to others. I want to talk about the number of  
16 commercially insured patients that have the potential to be  
17 affected by this joinder. The FTC focuses on market shares.  
18 At least today they mentioned a couple of times the number of  
19 patients who might be affected by this transaction. Now, the  
20 Plaintiffs allege that this joinder is going to substantially  
21 harm competition in the markets for general acute care  
22 inpatient hospital services and inpatient obstetrical services  
23 sold to commercial health plans.

24 Remarkably, there was hardly any mention of Mercy,  
25 which, as you know, has three hospitals, offers a wide range

1 of services from different geographic locations proximately  
2 located to ProMedica, or UPMC as a competitor, as competitors  
3 in this marketplace.

4 Listening to the FTC, one might think that the market  
5 for general acute care services, not just obstetrical  
6 services, is a duopoly. It isn't. General acute care  
7 services has four competitors. There will be three. But let  
8 me talk about this duopoly point because the FTC has made that  
9 point a couple of times as it relates to obstetrical services.

10 As a practical matter, the only obstetrical services  
11 that St. Luke's presently provides are basic OB services.  
12 St. Luke's handles uncomplicated deliveries. High-risk  
13 deliveries only occur at Mercy and at ProMedica. There has  
14 been a duopoly in this marketplace for high risk deliveries  
15 since time out of mind. And there is no suggestion, and I  
16 didn't hear the FTC say it this morning, that there has been  
17 any exercise of market power by either ProMedica or  
18 St. Luke's -- I'm sorry, ProMedica or Mercy with respect to  
19 those high risk deliveries.

20 So to the extent that this transaction, this joinder  
21 may result in a duopoly for inpatient obstetrical services for  
22 the low risk deliveries, one needn't be concerned about the  
23 potential for the duopoly to cause higher price. We've had a  
24 duopoly. There's no evidence that -- there's no evidence that  
25 there's been a problem here.

1           Now, let me talk for a minute about how many patients  
2           are actually going to be affected by this transaction. The  
3           number of commercially-insured patients that St. Luke's treats  
4           who are in the relevant product market in 2009 was 3790  
5           patients, or about 10 admissions a day. Ten admissions a day.

6           Of those 10, on average, Aetna insured one, Anthem  
7           insured two, Frontpath insured one, MMO insured four. We've  
8           got a new contract with them that's in effect until 2014. I'm  
9           not as worried about them anymore. United insured one, Cigna  
10          less than one, and Paramount also less than one.

11          And just so we're clear, only one out of those 10  
12          commercially-insured admissions to St. Luke's per day was an  
13          expected mother admitted to deliver a healthy baby.

14          THE COURT: Did this come from one of these?

15          MR. MARX: The next slide I think shows -- did  
16          this --

17          THE COURT: Are these -- is what you have on the  
18          screen in here?

19          MR. MARX: Yes, behind tab 1, Your Honor.

20          THE COURT: Thank you very much.

21          MR. MARX: Hopefully in the order.

22          THE COURT: I'm going to give this to Cathy, because  
23          I have it very nicely on the screen.

24          MR. MARX: There you go.

25          THE COURT: Thank you.

1 MR. MARX: My pleasure. Feel free to interrupt me  
2 any time. I'll do the best I can to answer the questions. I  
3 can't always.

4 THE COURT: That one wasn't too hard.

5 MR. MARX: Okay. Took me a little longer to get to  
6 the answer than I think you were expecting, but that happens  
7 all the time.

8 Now, the Plaintiff's position, the FTC's position and  
9 the State, too, is that the addition of St. Luke's 10  
10 commercially-insured admissions a day, combined with the 44,  
11 by the way that ProMedica admits, will somehow enable  
12 ProMedica to raise the rates it or St. Luke's charges  
13 commercial payors, like MMO and Anthem, to supra competitive  
14 levels.

15 Now, Mr. Reilly suggested -- he's done this a couple  
16 times, so I got curious. He suggested that the Defendant  
17 concedes -- they said it in their brief. They had a slide.  
18 They said Defendant concedes that Plaintiffs have established  
19 a presumption of competitive harm based on high market  
20 concentration levels. I heard it this morning. I read it in  
21 their brief when we first got their brief. They said,  
22 incredibly, Defendant appears virtually to concede that the  
23 extraordinarily high market concentration establishes  
24 Plaintiff's strong prima facie case.

25 So I looked at the footnote and I looked at the

1 cites, because I'm not always that articulate, and I  
2 frequently make mistakes when I talk. And I wanted to be sure  
3 that I hadn't said something like that. Because if I had, it  
4 would have been a terrible mistake. So I looked at page 42 of  
5 the transcript from our temporary restraining order  
6 discussion, and here's what I said.

7 First, the Government relies, as Mr. Reilly suggested  
8 I would say, the Government relies in the first instance on  
9 high market shares and market concentration. The Government  
10 says that those high market shares create a presumption of  
11 anticompetitive effects, but the cases all hold that high  
12 market shares and market concentration only create that  
13 presumption when they accurately predict future competitive  
14 effects.

15 And in this case, the market shares and the market  
16 concentration in Toledo are not an accurate predictor of the  
17 competitor's market power or the likelihood that ProMedica  
18 will be able to increase rates above competitive levels as a  
19 result of its joinder with St. Luke's.

20 I didn't make any concession there, at least not one  
21 that I've been able -- I've read this a few times, and I don't  
22 see where I conceded anything.

23 And then on the second citation, page 50, I said -- I  
24 don't see a concession here either --

25 The reality of these competitive alternatives and the

1 substantial constraint on ProMedica, despite its market share,  
2 is borne out by the ability of a payor, such as MMO, to  
3 exclude ProMedica completely from its network, as it did up  
4 until 2008.

5 So I don't see any concession there, I just want to  
6 be sure the record is clear. I haven't conceded, I haven't  
7 conceded for a second that they've established a presumption  
8 of competitive harm based on high market concentration levels.  
9 Not only do I not concede it, they can't prove it.

10 And when you look at the market share numbers and the  
11 concentration levels in the face of the competitive reality of  
12 the marketplace, you'll see they haven't met their burden of  
13 proof at all.

14 So for the next three hours, we plan to discuss with  
15 you the reasons why, in light of ProMedica's commitment to  
16 maintain St. Luke's as a fully operational general acute care  
17 inpatient hospital, offering essentially the same services it  
18 was providing at the time of the joinder for the next 10  
19 years. And to my knowledge, Plaintiffs still have not cited a  
20 case where a court has entered a preliminary injunction in the  
21 face of that kind of contractual and performance commitment  
22 negotiated by the parties to the transaction.

23 And tomorrow I'm going to show you -- I'm going to  
24 show you where in that joinder agreement it specifically says  
25 that St. Luke's board will have a right to enforce it if

1 ProMedica violates it, but I'm not going to do that today.  
2 But I'm going to explain to you why the Plaintiffs are not  
3 entitled, in light of that and other facts, to any injunctive  
4 relief, let alone the draconian preliminary injunction they  
5 have proposed, which ironically would not only return  
6 St. Luke's to the perilous financial situation it faced  
7 immediately prior to its joinder with ProMedica, but would  
8 worsen it. In fact, it would prohibit, as drafted -- I may be  
9 misreading it, but I don't think so. As drafted, the  
10 Plaintiff's proposed preliminary injunction would prohibit  
11 St. Luke's from engaging in conduct that it could have pursued  
12 itself, such as, for example, exercising its contractual right  
13 to terminate contracts with payors, renegotiating contracts  
14 with payors, changing its service offerings, hiring or firing  
15 employees, had it not pursued the joinder and continued to  
16 operate on its own.

17 Finally, as I wrap up my introduction to our  
18 defense -- I know it seems like more than an introduction -- I  
19 want to respond to your question about how hard it might be to  
20 unwind the joinder if the FTC somehow prevails in its part  
21 three complaint and beyond. We'll talk about this in a little  
22 bit more detail tomorrow, as well. I'm not surprised that the  
23 FTC would say it's virtually impossible to unwind a  
24 consummated deal, but it's really not that hard particularly  
25 in this case. Because we know that St. Luke's will continue

1 to exist as a fully operational general acute inpatient care  
2 hospital, offering almost all of the same services that it's  
3 offering today. That's not going to change. It's not going  
4 to change for 10 years.

5 But if in the interim for some reason ProMedica does  
6 what the FTC predicts it will do -- and we say it won't, by  
7 the way -- and that is, raise prices above competitive levels  
8 to payors, the FTC has a whole host of remedies that it can  
9 pursue in addition to divestiture of the fully operational  
10 hospital that will exist in two or three years.

11 And it's pursued these kinds of remedies in other  
12 cases. It could, for example, if we negotiated an  
13 anticompetitive agreement with the payor, say, give the payor  
14 the right to terminate that agreement on 60 days' notice if it  
15 wanted to. The FTC orders that kind of relief all the time in  
16 other cases.

17 Not only that. This case may be an economist's  
18 dream. Very rarely do you have a situation where you know  
19 exactly what the prices were before the allegedly  
20 anticompetitive conduct and what the prices were after the  
21 allegedly anticompetitive conduct. We know what the contracts  
22 provide today in terms of reimbursement rates.

23 And if ProMedica, on behalf of St. Luke's,  
24 renegotiates a contract that St. Luke's has with a payor,  
25 we'll know what the new price is. And if the FTC can prove



1 that that price is supra competitive, damages calculation  
2 ought to be pretty easy. So the FTC will have all sorts of  
3 remedies that it can pursue if it ultimately prevails.

4 It's going to have a hospital that isn't going to be  
5 very much different than the one that we have today. And if  
6 we do negotiate supra competitive prices in new contracts,  
7 they can give the payors the right to terminate the contract,  
8 and -- and it will be easy for those payors or the FTC, if it  
9 wanted to pursue a remedy of disgorgement or something like  
10 that, and I'm not suggesting it by the way, but if they did,  
11 they could, because they'd know what the price was before and  
12 they'd know what the price was after.

13 You very rarely see an antitrust case where the  
14 computation of damages, if they exist, could be that easy.

15 So if we lose, if we're wrong about this, and I don't  
16 think we are, if we're wrong about all this and ultimately the  
17 FTC is able to meet its burden of proof before the Federal  
18 Trade Commission, and they can find a way to get the Sixth  
19 Circuit to affirm, then there will be a remedy there, and it  
20 won't be very hard to undo this deal.

21 Okay. Let me talk for a minute about what our agenda  
22 is for the rest of the afternoon. First, my colleague, Amy  
23 Hancock, is going to discuss the legal standard this Court  
24 should apply in evaluating Plaintiff's request for injunctive  
25 relief and the role of the Court in evaluating both the

1 underlying merits of the Plaintiff's case and the question  
2 whether the requested injunctive relief is in the public  
3 interest.

4 After that, Ms. Carletti's going to discuss St.  
5 Luke's deteriorating financial condition and its viability as  
6 a stand-alone community hospital as of August 31st, 2010, the  
7 date of its joinder with ProMedica.

8 Then I will come back and discuss the nature and  
9 history of competition in the alleged relevant market, as well  
10 as the likely competitive effects of the joinder. I doubt  
11 that it will come as a surprise to you that the conclusion I  
12 will reach is that Plaintiffs cannot meet their burden of  
13 showing that the joinder is likely to substantially lessen  
14 competition in either the alleged general acute care inpatient  
15 services or obstetric services markets in Lucas County.

16 Mr. Wu will then discuss the parties' motivation for  
17 pursuing the joinder, and finally, you'll hear from me for the  
18 last time today when I discuss the joinder's pro-competitive  
19 benefits both for the parties and for the community they  
20 serve.

21 At the end of the day today, I'll give you a preview  
22 of what we intend to talk about tomorrow.

23 Thank you, Your Honor. With that --

24 THE COURT: Excuse me.

25 MR. MARX: Sure.

1 THE COURT: One of the things which I have not heard  
2 from anyone is assuming increased concentration, could a  
3 facility dictate admission or exclusion of other entities to  
4 coverage under a healthcare insurer's plans, et cetera?

5 MR. MARX: For example, could ProMedica negotiate  
6 with Anthem an agreement that would say we don't want Mercy to  
7 be part of the network?

8 THE COURT: Whoever it may be.

9 MR. MARX: Sure.

10 And the answer to that is, they could try. And,  
11 indeed, that was the lay of the land, as you'll hear, up until  
12 2008.

13 And just so we're clear, there's nothing  
14 anticompetitive about that either, as long as, as long as the  
15 excluded provider has other -- as long as --

16 THE COURT: Alternatives.

17 MR. MARX: Exactly. Exactly.

18 And there's no -- you know, there's no payor that  
19 represents, as best I can tell, even in this narrow  
20 commercially-insured payor market, no payor represents more  
21 than maybe 21, 22 percent.

22 So to the extent that ProMedica negotiated with  
23 Anthem, as it did, to exclude, if you will -- not to include.  
24 I don't want to use -- not to include Mercy as part of  
25 Anthem's network, Mercy was free to negotiate with MMO, as it

1 did. And, by the way, it did negotiate the exclusion of  
2 ProMedica from MMO's network.

3 But there was a trade-off there. In exchange for the  
4 narrower network, ProMedica said, if you do that, we know that  
5 it's going to mean we're going to get more volume of patients  
6 from you, because there are going to be a whole host of  
7 patients that wouldn't otherwise go to Mercy, and in exchange  
8 for that volume we'll give you a better price. That is a  
9 pro-competitive result, not an anticompetitive result, and  
10 that's what was taking place here.

11 To a certain extent, we still have that. You've  
12 heard a lot about, you'll hear some more about, everybody, all  
13 the employers, you know, the payors, they all want open  
14 networks. They want to be able to select any provider they  
15 want. And in Toledo, for the most part now, that's what  
16 happens. Anthem's network is open, MMO's network is open. I  
17 think all of them are, except for one.

18 And, of course, the Government says that these closed  
19 networks can't succeed, but then they say but Paramount is  
20 doing great. And it is. And the fact that Paramount, with a  
21 narrow or limited access network is doing well demonstrates  
22 that employers and their insureds will accept the limited  
23 access network as long as they're getting some other benefits  
24 for it, and one of the benefits they get is a lower price.

25 So that's a long-winded answer to your simple

1 question, I think.

2 THE COURT: Thank you very much.

3 MR. MARX: Amy.

4 MS. HANCOCK: Thank you, Your Honor. Good afternoon.

5 THE COURT: Good afternoon.

6 MS. HANCOCK: To the extent I'm using slides, they  
7 will appear behind tab 2 in the notebook, and they will appear  
8 on your screen, of course.

9 I'm going to discuss the legal standards presented by  
10 the case that we're here for. The ultimate question presented  
11 by the FTC's challenge here is whether the joinder agreement  
12 between ProMedica and St. Luke's violates Section 7 of the  
13 Clayton Act. That's 15 U.S.C, Section 18.

14 Section 7 prohibits mergers where in any line of  
15 commerce in any section of the country the results of the  
16 merger may be substantially to lessen competition.

17 Responsibility for deciding this question lies in the  
18 first instance with an administrative law judge of the Federal  
19 Trade Commission, and then with the five Federal Trade  
20 Commissioners themselves on appeal, and ultimately with the  
21 Sixth Circuit.

22 But before we get to the Section 7 question, we have  
23 another federal statute that we're dealing with here, and  
24 that's section 13(b) of the Federal Trade Commission Act.  
25 13(b) allows the FTC to seek a preliminary injunction to block

1 consummation of a transaction pending resolution of an  
2 administrative trial. The responsibility for deciding the  
3 questions under that statute lie with this Court and again,  
4 ultimately, with the Sixth Circuit. And what this Court must  
5 decide, must exercise its independent responsibility to  
6 decide, is whether, weighing the equities, both public and  
7 private, determining whether -- considering the likelihood of  
8 the Commission's ultimate success on the merits of its Section  
9 7 claim, is entering an injunction in the public interest.

10 So since Section 13(b) is the primary statute of  
11 concern to the Court, let's start there.

12 The FTC has argued in the past and suggests here that  
13 it's entitled to injunctive relief merely because it has  
14 alleged an antitrust violation, but that standard has been  
15 rejected by the courts.

16 For example, in FTC versus Freeman, the FTC argued  
17 that it need only show a, quote, "fair or tenable chance of  
18 success on the merits," and the Court rejected that. As you  
19 can see, the Court said, such a standard runs contrary to  
20 Congressional intent and reduces the judicial function to a  
21 mere rubber stamp of the FTC's decisions. The Court found  
22 that Congress expected courts to use their independent  
23 judgment to review preliminary injunction actions and said we  
24 have, therefore, adopted a more stringent standard.

25 That more stringent standard is characterized in --

1 characterized in different ways by different courts, but most  
2 often the statement is that to show a likelihood of ultimate  
3 success, the FTC must raise questions going to the merits so  
4 serious, substantial, difficult and doubtful as to make them  
5 fair ground for investigation, study, deliberation and  
6 determination by the FTC in the first instance, and  
7 ultimately, the Court of Appeals.

8 An articulation of that standard is found in FTC  
9 versus Butterworth and also is recited in this FTC versus  
10 Freeman.

11 Significantly, courts have noted that the FTC's  
12 burden under this serious, substantial, difficult and doubtful  
13 standard is, quote, "not insubstantial." That's what the D.C.  
14 Circuit found in a case FTC versus Arch Koal.

15 In fact, if the FCC shows just a fair or tenable  
16 chance of success on the merits, that will not suffice for  
17 injunctive relief. That's from FTC versus Tenet Healthcare.

18 So as the Court of Appeals in D.C. Circuit said in  
19 the Whole Foods case, the Court may not simply rubber stamp an  
20 injunction whenever the FTC provides some threshold evidence;  
21 it must exercise independent judgment about the questions that  
22 Section 53(b) commits to it.

23 So if this Court's role is to exercise independent  
24 judgment about the questions committed to it by Section 53(b),  
25 what are those questions?

1 First, what is the FTC's ultimate likelihood of  
2 success on the merits of its Section 7 claim? And, second, do  
3 the equities favor entering the injunction?

4 So to synthesize the two statutes and the various  
5 roles, it is not appropriate for this Court merely to look at  
6 the FTC's complaint and motion, listen to Mr. Reilly's  
7 recitation of allegedly high market shares and high  
8 concentration and declare that a preliminary injunction is  
9 necessary. Rather, the Court must use -- exercise independent  
10 judgment and view the evidence presented by both the FTC and  
11 the Defendant, weigh the equities, including both public and  
12 private equities, and then decide whether the Commission is  
13 likely ultimately to succeed on the merits of its Section 7  
14 claim and decide whether entering an injunction is in the  
15 public interest.

16 So turning to the likelihood of ultimate success on  
17 the merits. Because the Court does have to make a decision as  
18 to the likelihood of that success, it must necessarily dive  
19 into the facts and theories that make up the Plaintiff's  
20 claim, and it must, of course, concern itself with whether  
21 those facts and theories make out a violation of Section 7.

22 A review of cases from a variety of jurisdictions  
23 show that thoroughness with which, even in preliminary  
24 injunction hearings, courts have reviewed the Government's  
25 claims.



1           So, for example, a case, California versus Sutter  
2     (phonetic), which was a Section 7 case brought by the State of  
3     California challenging a hospital merger, but it also was  
4     under the same standard, even though the state was the  
5     Plaintiff, the Court held a full-day -- four-day evidentiary  
6     hearing before denying the State's request for injunctive  
7     relief.

8           In FTC versus Butterworth, the District Court in the  
9     Western District of Michigan held a five-day trial and  
10    admitted over 900 exhibits before denying the FTC's request  
11    for a PI.

12          In FTC versus Tenet, the District Court also held a  
13    five-day trial, and in FTC versus Freeman, the District Court  
14    originally granted a request for the TRO without a hearing,  
15    but the Court of Appeals reversed and it went back to the  
16    district court for a two-day trial and the admission of a ton  
17    of evidence.

18          I mention these cases and the thoroughness of the  
19    district court's review not to argue that we should have a  
20    longer trial here, as happy as all of those -- all of us from  
21    the snowy north are to be here, but rather, to emphasize that  
22    the FTC's bold assertion that they're entitled to a  
23    preliminary injunction because they filed a complaint and  
24    pointed to high market shares is simply not correct. That's  
25    not the end of the story.

1           Rather, this Court must exercise independent judgment  
2           and weigh whether all the evidence from both the Plaintiffs  
3           and the Defendants supports the request.

4           All right. So with that, we turn to what are the  
5           requirements of Section 7? Section 7 is referred to as an  
6           incipiency statute. That is, it forbids mergers or other  
7           combinations, the effect of which may be substantially to  
8           lessen competition.

9           But the fact that the statute is forward-looking does  
10          not mean that any theoretical claim that a merger or  
11          transaction might violate the law is sufficient to state a  
12          claim. It might lessen -- the fact that the statute is  
13          forward-looking does not mean that any theoretical claim that  
14          a merger or other transaction might lead to a lessening of  
15          competition is insufficient -- is sufficient to find a  
16          violation of Section 7.

17          I hope Your Honor followed that.

18          Rather, the Supreme Court has held Section 7 deals in  
19          probabilities, not ephemeral possibilities. That's United  
20          States versus Marine Bank Corp.

21          So recognizing that Section 7 deals in probabilities,  
22          the Court in Long Island Jewish, United States versus Long  
23          Island Jewish Medical Center articulated the standard the  
24          Plaintiff must meet to show a Section 7 violation. The Court  
25          said, there must be a reasonable probability of a substantial

1 impairment of competition by an increase in prices above  
2 competitive levels to render a merger illegal under Section 7.  
3 A mere possibility will not suffice.

4 The Government has the burden on every aspect of the  
5 proof -- proof of its Section 7 claim. It must prove a  
6 relevant product in geographic market and that the transaction  
7 is likely to have anticompetitive effects in that market.

8 There was some talk earlier about product in  
9 geographic market. We do not agree with the Government's  
10 allegation that there is a separate product market for OB  
11 services. But the reality is that the primary area of  
12 disagreement in this case has to do with whether the FTC can  
13 show that the transaction is likely to have anticompetitive  
14 effects.

15 The FTC relies heavily on market concentration and  
16 increases in market concentration to support their claim. But  
17 as we are going to discuss, the fact that a market is  
18 concentrated, even the fact that the transaction results in a  
19 large increase in concentration is not enough to justify entry  
20 of an injunction.

21 Mr. Reilly said that we say market shares don't  
22 matter, but that's not the case. What we say is what the  
23 cases say, which is that market shares and market  
24 concentration are merely the beginning of the inquiry.

25 We cited in our brief to United States versus Baker

1 Hughes, a case from the D.C. Circuit, which involved very high  
2 market shares, and what the Court referred to as a, quote,  
3 "dramatic increase in HHI as a result of the transaction."  
4 Nevertheless, the injunction was denied in that case.

5 High concentration levels are common in many markets,  
6 including in virtually all nonurban hospital markets. And  
7 that fact is significant not just for this case but for the  
8 future and the implications of some of the things the FTC's  
9 theory suggests. They argue that whenever there is a merger  
10 in a concentrated market that results in a merger guidelines  
11 violation of the concentration levels and the elimination of a  
12 competitor, they're entitled to an injunction. But virtually  
13 every hospital market in the United States, outside of very  
14 large cities, New York City, Chicago, has very few  
15 competitors, hospital competitors. Toledo has four. Most  
16 markets have actually fewer than that; some five.

17 The implication of the Government's analysis is that  
18 virtually any hospital merger in any market is going to  
19 entitle the FTC to an injunction, and that's a very  
20 significant fact, given that all over the country, hospitals  
21 are facing pressures brought about by the provisions of  
22 healthcare reform to consolidate in order to do things like  
23 have accountable care organizations and other factors that  
24 healthcare reform is going to impose on the markets.

25 So as I mentioned, most nonurban hospital markets are

1 very concentrated. And, in fact, the FTC has requested  
2 preliminary injunctions in several of them.

3 Between 1993 and 2000, the Government brought six  
4 hospital merger challenges and did not persuade a federal  
5 court to grant a preliminary injunction in any one of them.

6 If we could have the next slide.

7 I'm going to talk about these cases just a little  
8 bit. The first one, Your Honor, is FTC versus Butterworth.  
9 Again, a case that's been mentioned from the Western District  
10 of Michigan. The Government alleged a general acute inpatient  
11 hospital services market and a separate primary care inpatient  
12 hospital services market. And interestingly, that market,  
13 that second market, the primary care inpatient market, was  
14 also a cluster market, like the general acute care market.  
15 The FTC points to that as precedent for the fact that their OB  
16 services market is a relevant geographic market -- a relevant  
17 product market. But nothing in that case suggested that --  
18 first of all, the Court described that market, the primary  
19 care services market, the evidentiary basis for it the Court  
20 described as very thin.

21 But there's nothing in that case or any other case to  
22 suggest that you could pluck a single service, OB, out of the  
23 all of the general acute care services that are offered inside  
24 a hospital and say that's a relevant product.

25 In any event, in both markets as you could see the

1 market concentration numbers were high, pre and post market  
2 shares were high and the increases in HHI were very high.

3 The Court -- after a five-day evidentiary trial, the  
4 Court agreed that the FTC had made out its prima facie case  
5 for a violation of Section 7, but it nevertheless refused to  
6 grant the injunction. The Court was persuaded that the two  
7 hospitals' justification for the merger, that it would result  
8 in efficiencies and cost savings because, for among other  
9 reasons, it would eliminate the need for one of the hospitals  
10 to build an entirely new facility might result in benefits to  
11 the community that outweighed the anticompetitive effect.

12 The next case we're going to talk -- I wanted to  
13 mention is FTC versus Tenet Healthcare. Again, the product  
14 market was alleged to be general acute inpatient services.  
15 And the case involved the merger of two hospitals in Poplar  
16 Bluff, Missouri, a small town in the southeast section of that  
17 state. The two merging hospitals were the only two hospitals  
18 in Poplar Bluff, although Tenet owned another hospital within  
19 the same general geographic area, and there were other larger  
20 hospitals in nearby communities.

21 The FTC alleged that in its geographic market, the  
22 merging firms accounted for 84 percent of the market, and had,  
23 as you can see, extraordinarily high HHIs.

24 A preliminary injunction was granted by the District  
25 Court in that case, but reversed by the Court of Appeals. As

1 they do here, the FTC pointed to testimony that supposedly  
2 established that payors believed it was essential, essential  
3 for their plans to include a Poplar Bluff hospital in their  
4 benefit package because their subscribers would not travel to  
5 other towns for primary and secondary care services.

6 According to payor testimony, their subscribers,  
7 quote, "find it convenient to use a Poplar Bluff hospital, and  
8 therefore the payors asserted that they would not be able to  
9 steer patients away from Poplar Bluff hospitals in response to  
10 a price increase." These facts are discussed at page 1049 of  
11 the decision.

12 The Court of Appeals found the geographic market  
13 contrived, and indeed, absurd, and reversed the District  
14 Court's grant of a preliminary injunction.

15 THE COURT: Well, we don't have -- do we really have  
16 any question about geographic market as contrasted to lines of  
17 service, as I prefer to call it?

18 MS. HANCOCK: Exactly. No, we don't have a question  
19 about geographic market, but the decisions that the -- we  
20 don't have much of a question about geographic market, before  
21 Mr. Marx throws something at me.

22 The fact that the case was decided on the  
23 Government's failure to properly allege a geographic market  
24 isn't the end of the inquiry from our perspective in terms of  
25 what the case teaches us about useful lessons applicable to

1 this case.

2 The Court noted that the reliance on the testimony of  
3 large sophisticated third-party payors, managed care companies  
4 like Anthem, MMO and Aetna would be here, to the effect that  
5 they were powerless in the face of a price increase was, as  
6 the Court said, suspect.

7 The Court said, we question the District Court's  
8 reliance on the testimony in face of -- in the face of  
9 contrary evidence that these for-profit entities would  
10 unhesitatingly accept a price increase rather than steer their  
11 subscribers to hospitals in nearby communities. Without  
12 necessarily being disingenuous or self-serving, or both, the  
13 testimony is at least contrary to the payor's economic  
14 interests, and thus, suspect.

15 And the Court went on: In spite of their testimony  
16 to the contrary, the evidence shows that large, sophisticated  
17 third-party buyers can and do resist price increases,  
18 especially where consolidation results in cost savings to the  
19 merging entities. The testimony of the market participants  
20 spoke to current competitor perceptions and consumer habits  
21 and failed to show where customers would practicably go for  
22 inpatient hospital services, by implication and response to a  
23 price increase.

24 That's precisely the position here, Your Honor. The  
25 FTC points to payor affidavits and declarations allegedly to



1 the effect that ProMedica will have increased leverage as a  
2 result of this transaction, and it points to evidence  
3 allegedly showing that some of St. Luke's patients prefer not  
4 to travel beyond southwest Toledo.

5 But as will be discussed in greater detail by my  
6 colleagues a little bit later on, that evidence is suspect.  
7 And although there is some characteristics of the Tenet case  
8 that are very like this case, there are some important  
9 differences. Here, after the merger, two very significant  
10 competitors continued to exist within the confines of the  
11 geographic market alleged by the Government. Payors don't  
12 have to convince purchasers of services to go to Cleveland for  
13 those services, they only have to convince someone to go to  
14 St. Vincent instead of the Toledo Hospital. There's no  
15 geographic difference between St. Vincent's and Toledo  
16 Hospital.

17 So we're not talking about having to expand the  
18 geographic market. We're saying that the real competitive  
19 conditions on the ground are such that these large  
20 sophisticated payors have the ability to steer patients away  
21 from ProMedica hospital in response to a price increase. And  
22 the Government's failure to take into account the likely  
23 market dynamics in response to the merger, instead their focus  
24 exclusively on the static conditions that exist today, is  
25 inappropriate, and that's what the case stands for.

1           The next case I want to discuss is FTC versus  
2     Freeman. This is another case involving a merger of two  
3     hospitals in a small to medium size town in Missouri. The  
4     case involved two hospitals in Joplin, Missouri, where there  
5     were three hospitals before the merger, one large, and the two  
6     merging parties, both of which were smaller. And of those two  
7     smaller hospitals, Oak Hill had, according to the decision,  
8     been experiencing financial difficulties such that its  
9     trustees believed a merger with Freeman would strengthen its  
10    financial standing and enable it better to compete.

11           The Court of Appeals in that case upheld the District  
12    Court's decision to deny the request for preliminary  
13    injunction, and, again, although the decision deals with  
14    whether the evidence supported the alleged geographic market,  
15    the Court's criticism of the FTC's evidence is relevant here  
16    on the point that it's too static, it presents a too static  
17    view of the market.

18           As the Court said, the testimony from market  
19    participants in this case spoke mainly to current competitor  
20    perceptions and current consumer habits and not to the crucial  
21    question of where consumers could practicably go to seek  
22    alternative acute care inpatient services in the event of a  
23    merger.

24           A similar finding about the impact and relevance of  
25    customer complaints is expressed in a case that was not a

1 hospital merger case, FTC versus Arch Koal. There, the Court  
2 of Appeals for the District of Columbia Circuit found that  
3 while the Court does not doubt the sincerity of the anxiety  
4 expressed by customers, the substance of their concern  
5 articulated is little more than a truism of economics. A  
6 decrease in the number of suppliers may lead to a decrease in  
7 the level of competition in the market. Customers do not, of  
8 course, have the expertise to say what will happen in the  
9 market.

10 And, again, that's FTC versus Arch Koal, 329 F.2d, at  
11 145.

12 And so returning to the hospital merger cases, United  
13 States versus Long Island Jewish Medical Center, a case from  
14 the Eastern District of New York, in this challenge brought by  
15 the Department of Justice rather than the Federal Trade  
16 Commission, but nevertheless involving the same statute,  
17 Section 7 and Section 13(b), there are some aspects of this  
18 case that are similar to the aspects of Long Island Jewish  
19 that are similar to this case in that the FTC alleges here the  
20 combination of ProMedica and St. Luke's creates a must-have  
21 hospital system, and there, the Government made a similar  
22 allegation.

23 The merging parties, Northshore Hospital System and  
24 Long Island Jewish were located just 2 miles from each other.  
25 The hospitals were described as being fierce competitors, and

1 both were quality teaching hospitals that provide high level  
2 training programs. The Government alleged a product mark  
3 market consisting of acute inpatient services provided by  
4 anchor hospitals to managed care plans, and in that product  
5 market in the geographic market alleged, the merged firm had a  
6 100 percent market share.

7 Nevertheless, the Court denied a preliminary  
8 injunction, again focusing on the fact that the Government's  
9 theory of the case failed adequately to address the real world  
10 competitive conditions faced by the hospitals.

11 Despite the Government's economic expert's testimony  
12 that he had calculated the merged firms would have the ability  
13 to raise prices 20 percent, the Court found that the  
14 Government had not shown likely anticompetitive effects.  
15 According to the Court's decision, the Government failed to  
16 prove by a preponderance of evidence that the merged entity  
17 would, in all probability, produce an anticompetitive effect  
18 by a price rise above competitive levels.

19 In reaching this conclusion, the Court was influenced  
20 by evidence that there were suitable alternative hospitals.  
21 As here, the evidence showed that there were several hospitals  
22 offering identical services to the merging parties located  
23 within a few miles of them. And also, the Court was  
24 influenced by the countervailing bargaining power of the large  
25 insurance companies in the market, among other factors.

1           The last of the cases I'm going to discuss in detail,  
2   Your Honor, is United States versus Mercy Health System.  
3   There, the Government sued to challenge the merger of the only  
4   two general acute care hospitals in Dubuque, Iowa.

5           THE COURT: It should be made clear for the record  
6   that this is totally unrelated to the Mercy system that has  
7   been referred to in these proceedings.

8           MS. HANCOCK: You are exactly right, Your Honor.  
9   Thank you.

10          Again, the facts presented a market with allegedly  
11   very high market shares. According to the Government, the two  
12   hospitals would have had a combined 78 percent share of the  
13   market for general acute inpatient services. Nevertheless, a  
14   preliminary injunction was denied, and after a careful review  
15   of actual marketplace realities facing the hospitals and the  
16   payors in the market.

17          As the Court noted in that case, although a great  
18   deal of emphasis is placed on market share statistics, they  
19   are not conclusive indicators of anticompetitive effects.  
20   That's at 902 F.Supp, at 976.

21          Further, like other courts that have denied  
22   government requests, the Mercy Health Systems court found that  
23   the Government's case rests too heavily on past healthcare  
24   conditions and makes invalid assumptions as to the reactions  
25   of third party payors and patients to price changes. The

1 Government's case fails to undergo a dynamic approach to  
2 antitrust analysis, choosing instead to look at the situation  
3 as it currently exists within a competitive market.

4 In short, the decisions in these litigated hospital  
5 merger cases demonstrate, first and foremost, that the  
6 existence of high market shares and an increase in  
7 concentration, even a very large increase in concentration,  
8 simply is not enough to justify the entry of a preliminary  
9 injunction where, as will be the case here, the evidence shows  
10 the market is and will continue to function competitively.

11 And, secondly, they show courts even at a preliminary  
12 injunction stage, closely and in detail analyzing the factors  
13 necessary to establish whether the FTC is likely to prevail on  
14 its Section 7 claim.

15 Finally, what we learned from these courts is, as the  
16 District Court for the District of Columbia said in FTC versus  
17 Arch Koal, antitrust theory and speculation cannot trump  
18 facts, and even Section 13(b) cases must be resolved on the  
19 basis of the record evidence relating to the market and its  
20 probable future.

21 THE COURT: Go ahead and finish it. I have a  
22 question.

23 MS. HANCOCK: That's fine. Now's a good time.

24 THE COURT: Now, I'm listening and I'm guessing --  
25 you don't have to guess very much -- that ProMedica and

1 St. Luke's are objecting to the selection of these two  
2 segments of their respective offerings to the public, acute  
3 care and OB, because they are the most -- those which reflect  
4 the largest growth concentration.

5 Do the cases ever discuss the favorable, in most  
6 instances I would surmise, or unfavorable impact on other  
7 lines of service, which impact is made possible as a result of  
8 the increased concentration?

9 MS. HANCOCK: Well, let me take it one step at a  
10 time.

11 First of all, ProMedica does not object to the  
12 product market, the general acute care inpatient services  
13 product market. That is the product market, it's referred to  
14 as a cluster market, that has been used by all the cases that  
15 analyze hospital mergers in recent times, and it is the  
16 appropriate market in which to analyze the effects of the  
17 merger of two hospitals.

18 THE COURT: Thank you.

19 MS. HANCOCK: We do object to plucking out of that  
20 general cluster market the single service of OB, and we don't  
21 think that there's any legal support for that in the case law  
22 or any basis for doing it other than to give the Government  
23 the advantage of being able to stand up and say it's merger to  
24 duopoly.

25 But there's no basis for taking OB out of the general

1 acute care market. It is true that someone who wants to  
2 deliver a baby can only deliver a baby. They don't want a  
3 knee replacement. But that's also true of every other  
4 individual service line that's offered in hospitals.

5 In terms of the second part of your question, Your  
6 Honor, I'm not sure I understand whether they've --

7 THE COURT: Well, let me --

8 MS. HANCOCK: Does the combination of the general  
9 acute care services give either party market power in some  
10 other, like, tertiary services that aren't part of the alleged  
11 market? Is that . . .

12 THE COURT: In other words, do the cases discuss the  
13 probable impact on the abilities of the providers of these  
14 services to increase the concentration in those areas, as  
15 well, and/or to dictate because of their increased, call it  
16 power, bargaining power, with respect to those lines of  
17 service?

18 MS. HANCOCK: And I think the answer, subject to  
19 being corrected by people who are smarter than me about this,  
20 I think the answer to that is no. The point of defining the  
21 relevant market, to say this is the market in which we are  
22 going to analyze the effects of this transaction is, it's  
23 saying this is the group of products or services that are  
24 reasonably interchangeable as to which, if one could exercise  
25 power and raise prices over this group of products, that would



1 have an impact on customers' choices.

2 The point of leaving other products and services out  
3 is that a price increase in the chosen product market is not  
4 going to have an impact on the products that are not part of  
5 the product market.

6 So the structure -- so in order to determine whether  
7 there's a Section 7 violation, you don't just look at market  
8 shares and market power and market concentration. You have to  
9 look at the structure, history and probable future of the  
10 market. And Mr. Marx, Ms. Carletti, Mr. Wu are all going to  
11 discuss factors related to the structure, history and probable  
12 future of this market.

13 But what I would just say is that the evidence in  
14 this case will show, that when analyzing those factors, the  
15 probable future of the market for inpatient hospital services  
16 in Toledo, the joinder of St. Luke's hospital into the  
17 ProMedica Health System will not confer upon ProMedica the  
18 sort of market power condemned by Section 7. That is, the  
19 power to raise prices above a competitive level.

20 And that brings me to an additional area of  
21 disagreement between us and the FTC over what must be shown to  
22 show a likely anticompetitive effect.

23 An anticompetitive effect in the context of a Section  
24 7 case is determined by looking at, first, with reasonable  
25 probability, will the merged entity have enough market power

1 to enable it to increase prices above a competitive level?

2 Is that the wrong slide? No, that's it. Okay.

3 Increase prices above competitive levels for a  
4 substantial period of time. And, second, will the merged  
5 entity reduce the quality of care, treatment or medical  
6 services rendered? This is from United States versus Long  
7 Island Jewish Medical Center.

8 Here, although the Plaintiffs point to some comments  
9 made when St. Luke's was -- first began its discussions with  
10 ProMedica suggesting concerns on St. Luke's part about  
11 ProMedica's quality scores, there is no serious evidence to  
12 support the notion that ProMedica has any intension to or is  
13 likely to try to reduce the quality of care of medical  
14 services offered at St. Luke's. Any such claim is clearly  
15 contrary to every intent and every incentive that ProMedica  
16 has to maintain the quality of St. Luke's.

17 Rather, Plaintiff focuses more on their price claims.  
18 Their characterization of the likely impact on prices in the  
19 market as a result of the transaction is not consistent with  
20 the requirement of establishing a Section 7 claim. They point  
21 to the possibility that prices will rise, and say that that  
22 shows a Section 7 violation. But Section 7 does not condemn  
23 price increases, nor does it condemn price increases that  
24 result from mergers. Section 7 forbids mergers where the  
25 effect may be substantially to lessen competition. And when

1 courts have talked about substantial lessening of competition,  
2 they have talked about the ability to raise prices above a  
3 competitive level.

4 Plaintiffs have not argued and they cannot prove that  
5 ProMedica is currently achieving supra competitive prices and  
6 as will be discussed in much greater detail later, they're not  
7 going to be able to show that they're likely to be able to  
8 raise prices to a supra competitive level as a result of the  
9 merger.

10 The next question in front of the judge on--- in  
11 front of the Court, I beg your pardon, on the Section 13 fee,  
12 is weighing the equities. In addition to considering whether  
13 Plaintiffs have demonstrated that they are likely to prevail  
14 on the merits, the Court must separately consider whether  
15 equities favor entering the injunction.

16 Under Section 53B, the Court may properly consider  
17 both public and private equities, and many courts deny  
18 preliminary injunctions in hospital merger cases on the  
19 grounds that the equities do not support entry of the  
20 injunction, even in a case where the Plaintiff has made out a  
21 prima facie showing. That is, in FTC versus Butterworth where  
22 the Court denied a preliminary injunction even though they  
23 found that the FTC had made its prima facie showing of a  
24 Section 7 violation, the Court nevertheless found that the  
25 public interest in the likely efficiencies that would be

1 achieved from the consolidation of the two hospitals justified  
2 denying the injunction.

3 Also in FTC versus Freeman, the Court denied an  
4 injunction on equities ground where one hospital's financial  
5 status was such that it might not be in business to complete  
6 the merger by the time the FTC concluded its administrative  
7 hearing.

8 This Court must weigh the equities and make an  
9 independent determination as to whether those equities favor  
10 the entry of an injunction, and deny the Plaintiff's request  
11 if it finds that they do not. And that analysis and inquiry  
12 is separate from and distinct from the inquiry of whether they  
13 are likely to succeed on the merits of their Section 7 claim.

14 And finally, the last legal standard sort of issue  
15 has to do with the purpose of the injunction under Section  
16 13(b). Again, Mr. Marx is going to discuss in greater detail  
17 the reasons why the evidence demonstrates that an injunction  
18 is not necessary here for the reasons that injunctions are  
19 required in Section 13(b). The purpose of an injunction is to  
20 avoid the need for intrusive relief later on, since the  
21 difficulty of unscrambling the merged assets often precludes  
22 an effective order of divestiture. That's a quote from FTC  
23 versus Whole Foods.

24 But here, we submit that an effective order of  
25 divestiture can be achieved without the need for the

1 injunction. Mr. Marx has already mentioned the reasons for  
2 that, and there will some additional discussion of it again  
3 later.

4 And with that, Your Honor, I'm done, unless you have  
5 questions for me.

6 THE COURT: No, thank you. You've answered them.

7 MS. CARLETTI: Good afternoon, Your Honor. While I  
8 have the dubious task of discussing financials and St. Luke's  
9 financial viability on August 31st of 2010, I'm going to be  
10 speaking for about a half hour. So we can keep going through.  
11 I don't know if you want to take a break?

12 THE COURT: No, why don't we go ahead and when you're  
13 through, we'll take a break.

14 MS. CARLETTI: Okay.

15 Well, like I said, what I'm going to be discussing  
16 for the next half hour or so is St. Luke's financial  
17 stability, its viability and its deteriorating financial state  
18 as of August 31st of 2010. And if you actually look at  
19 St. Luke's operating expenses over the course of the last  
20 decade, you'll see some -- a lot of red on that graph. You'll  
21 note that over the course of the last decade, St. Luke's  
22 operating expenses exceeded its net patient revenue every year  
23 over the course of the last decade except for four. And even  
24 in the last five years alone, St. Luke's operating expenses  
25 exceeded its operating income in every year but one, and that

1 was 2006, when St. Luke's was able to have operating income of  
2 about [REDACTED].

3 Ultimately in 2007, though, that number dropped  
4 significantly, and St. Luke's recorded an operating loss of  
5 [REDACTED].

6 Now, these results don't change if you look at  
7 St. Luke's parent company, Ohio Care. In fact, these results  
8 get worse. In 2007 alone, Ohio Care recorded an operating  
9 loss of over [REDACTED]. 2008, that number jumped to be an  
10 operating loss for Ohio Care of over [REDACTED]. And in  
11 2009, Ohio Care recorded over [REDACTED] in operating losses.

12 Now, in the past, up until about 2008, St. Luke's had  
13 been able to use its investment income to generate the cash  
14 that it needed to operate the hospital. And oftentimes that  
15 masked the hospital's operating losses. But in 2008, with the  
16 market crash, St. Luke's could no longer do that, and it could  
17 no longer subsidize its hospital losses with its investment  
18 income.

19 Now, prior to the hiring of Dan Wakeman in 2008,  
20 St. Luke's tried a number of different things to improve its  
21 financial performance, and I will note that it was  
22 unsuccessful in doing so. It laid off employees, it developed  
23 a management services organization to try to support  
24 independent and additional employed physicians, it  
25 renegotiated its payor contracts, it leveraged its investments

1 through leases and short-term financing, and it cut expenses  
2 for medical supplies.

3 And the Plaintiff's right, in 2008, St. Luke's  
4 brought Dan Wakeman on to try to turn things around. And when  
5 he came onboard he established a three-year strategic plan,  
6 with the main goal to try to improve St. Luke's financials and  
7 get its declining revenues -- and getting its declining  
8 revenues up, but also to try to decrease its costs.

9 And once Wakeman started at St. Luke's, he began  
10 implementing additional measures, along with the St. Luke's  
11 staff, to try to cut costs in 2008 and 2009.

12 He froze capital spending, with the exception of  
13 capital that was necessary for patient safety, patient care,  
14 regulatory oversight, the breakdown of necessary assets, or  
15 capital expenditures that were needed for very high strategic  
16 importance.

17 He also reduced senior management salaries, and he  
18 froze the salaries of other staff members. St. Luke's also  
19 froze its hiring for all employees, other than the hiring of  
20 replacements of individuals who were related to patient care  
21 services and patient safety. In fact, St. Luke's at the time  
22 had developed a committee that would actually review every  
23 single individual who St. Luke's was considering hiring and  
24 determine whether they should hire that person and whether or  
25 not it fit within their goals.

1           At the same time, St. Luke's reduced its paid time  
2 off for employees and required employees to contribute greater  
3 amounts for their health insurance, and actually converted its  
4 defined benefit retirement plan to a defined contribution  
5 retirement plan.

6           Earlier this morning you heard Mr. Reilly tell you,  
7 this is what everybody was doing. The economy was going down.  
8 And he's right, companies all over this country were doing  
9 this at the time of the drop in the economy.

10           But there's one key factor that's unique to  
11 St. Luke's. They were cutting themselves down to the bone,  
12 and in 2009, St. Luke's Hospital was the only hospital in  
13 Toledo that didn't make a profit. Everybody else did.

14           You also heard a little bit this morning about Dan  
15 Wakeman's three-year plan and -- but you didn't really hear a  
16 lot of details about what that plan was, and overall, what the  
17 strategic initiative was.

18           When Dan Wakeman came to St. Luke's, he developed his  
19 three-year strategic goal and it was based off of five  
20 pillars, one of which was growth. The other were things like  
21 people, quality, service, finance, corporate initiatives. A  
22 large part of the growth plan, the thing we're really focused  
23 on here, entailed removing services from St. Luke's general  
24 acute care inpatient offerings and shifting those to  
25 outpatient services.



1           Now, to the extent that Wakeman succeeded in doing  
2           that, to the extent he succeeded in increasing outpatient  
3           volume, that didn't have any effect on inpatient acute care  
4           revenue. And that really is the key focus here in this case.  
5           It's the market that the Plaintiffs are focused on, and as  
6           you'll see in a little bit, covering of the cost that  
7           St. Luke's had to provide inpatient care ultimately was the  
8           real problem that St. Luke's had.

9           And an initiative to try to increase outpatient  
10          revenue didn't fix that problem. And I'll show you some  
11          slides in a little bit that actually show you that.

12          Another large element of the growth plan that Dan  
13          Wakeman had was to rebuild St. Luke's staff by acquiring  
14          additional physician practices. And this morning Mr. Reilly  
15          showed you a slide. I think it was number 113, which actually  
16          showed you Ohio Care's patient revenue, not profits, not  
17          EBITDA, but only patient revenue over the last decade or so.  
18          And if you notice the large jump he pointed to in 2009, well,  
19          that large jump was due to Dan Wakeman's goal of acquiring  
20          additional patient practices, and that revenue that came in  
21          from that jump --

22                 THE COURT: You mean doctors' practices.

23                 MS. CARLETTI: Sorry, doctors' practice, you're  
24          absolutely right. And the revenue that came in from that  
25          large jump, while it did increase Ohio Care's revenue in

1 general, I believe that everybody here would agree that that  
2 growth is not necessarily sustainable. And so you saw that  
3 increase by the acquisition of these additional practices, but  
4 it's just not sustainable.

5 THE COURT: And I presume the increase was, in part,  
6 offset by the cost of the acquisition and the continuing cost  
7 in some instances of the acquisition.

8 MS. CARLETTI: Absolutely. Absolutely.

9 And those costs and the revenue ultimately, I think  
10 the financials show, that the revenue that comes in, and  
11 you'll see it with the cost coverage issues, ultimately  
12 weren't able to cover the cost of care that St. Luke's was  
13 providing. So ultimately, St. Luke's was different from the  
14 prior hospitals and the prior turnaround situations that Dan  
15 Wakeman had.

16 And we also had a declining economy. And although  
17 Dan Wakeman was unable -- was able to meet some of his goals,  
18 he was unable to get St. Luke's financials to the point where  
19 it could continue as a viable community hospital servicing  
20 this community.

21 And I'll actually show you what those numbers look  
22 like, if we could pull the screen back up. Let's go back to  
23 slide two.

24 You see that in 2007, like I said, we had a operating  
25 loss of [REDACTED]. In 2008, that jumped to [REDACTED].

1 In 2009, that plummeted all the way down to [REDACTED].

2 And I want to point 2009 out to you for a key reason.  
3 And that is this morning, if you remember when Mr. Reilly was  
4 going through all of the goals that Mr. Wakeman had met, he  
5 showed you that Mr. Wakeman had achieved most of those goals  
6 by the early half of 2009, and yet, you see that St. Luke's  
7 operating losses [REDACTED] between 2008 and 2009, when he  
8 supposedly met every one of the goals.

9 So what was the result of this? Well, first and  
10 foremost, St. Luke's financial performance caused Moody's to  
11 downgrade St. Luke's bond rating four grades, and that  
12 downgrade happened in just 16 months. In other words, in just  
13 16 months, St. Luke's ability to access capital markets  
14 decreased significantly. And that resulted in an increase of  
15 St. Luke's costs of borrowing.

16 Now, Moody's analysis downgrading St. Luke's bond  
17 rating is very telling, and ultimately, Moody's concluded  
18 that it was downgrading St. Luke's really for three reasons.  
19 First, because St. Luke's had sustained continued operating  
20 losses, and those losses [REDACTED]  
21 [REDACTED].

22 The other reason that was a significant factor for  
23 Moody's was the fact that St. Luke's had unfavorable  
24 commercial payor contracts. Ultimately, the reimbursement  
25 rates it received from its payors just weren't covering its

1 costs.

2 And, finally, Moody's was also concerned, and one of  
3 the reasons it cited in its opinion downgrading the bond  
4 rating was, St. Luke's depleting cash reserves.

5 Now, the Plaintiffs will argue and have told you that  
6 based upon their expert's analysis, St. Luke's rating was  
7 going to go up, and their expert, Mr. Bricks, came to that  
8 conclusion by doing no independent verification of his own.  
9 And I think we've gone through this fully in our Daubert  
10 motion, but ultimately, the conclusions that Mr. Bricks comes  
11 to regarding St. Luke's bond ratings is really based off of  
12 looking at the documents and doing no independent verification  
13 of his own.

14 So let's actually look at what Moody said. Let's go  
15 to the next one. Oh, I'm sorry. Keep going back. All the  
16 way back to number 7. There we go.

17 One of the challenges that Moody's identified for  
18 St. Luke's in downgrading its bond rating was the fact that it  
19 had three consecutive years of operating losses. And this was  
20 the exact state that St. Luke's found itself in at the time of  
21 the transaction.

22 Moody's also noted that a continued challenge would  
23 be St. Luke's unfavorable commercial contracts and its ongoing  
24 challenges with negotiating higher commercial reimbursement  
25 rates with its two largest commercial payors, who at the time

1 were MMO and Anthem.

2 And as you can see here, Moody's identifies them as  
3 accounting for approximately 22 percent of St. Luke's gross  
4 revenue.

5 Later in the report, Moody's notes that St. Luke's  
6 inability to negotiate more competitively priced contracts  
7 with its payors is one of its challenges, but also that  
8 St. Luke's commercial payor rates -- and it's not on this  
9 slide, but they said St. Luke's commercial payor rates were,  
10 quote, "well under the market medians in the region."

11 The market conditions that St. Luke's faced in Toledo  
12 were also among St. Luke's most difficult and important  
13 challenges going forward. As you can see here, Moody's  
14 recognized the challenge of competing in this market, and  
15 noted it was a very competitive market, with a number of  
16 hospitals that were part of two larger and financially  
17 stronger systems, ProMedica and Mercy, both of which had  
18 higher bond ratings than St. Luke's, and also in both --

19 Next one.

20 And also in St. Luke's primary service area, as well  
21 as Toledo at large, St. Luke's faced weak demographics,  
22 declining volume trends, high-end employment levels and low  
23 median income levels. This didn't seem like it was going to  
24 change, and there didn't seem to be much improvement in sight.

25 Ultimately, Moody's was also concerned about

1 St. Luke's cash reserves and how St. Luke's --

2 Go ahead. You can go to the next one.

3 -- and how St. Luke's decrease in operating cash flow  
4 could result in a depletion of St. Luke's cash reserves. And,  
5 in fact, Moody's stated this outlook reflects our concern that  
6 cash reserves could decline if operating cash flow deficits  
7 continue.

8 Now, the issue here with the cash reserves I think is  
9 important, and there wasn't much talked about it this morning,  
10 but one of the theories that the Plaintiffs and their expert,  
11 Mr. Gabe Dagen, had put forward is that the solution to  
12 St. Luke's financial problems at the time were for St. Luke's  
13 just to drive down its cash reserves, for it to dip into its  
14 unrestricted net assets, and it didn't really matter where the  
15 cash came from, just as long as St. Luke's had cash available  
16 to spend it on its operations.

17 But this suggestion really ignores the reality of  
18 what a reserve is. It's a safety net. And if you bleed down  
19 that reserve fund, you jeopardize the hospital's future  
20 financial viability. It's exactly what Moody's recognized,  
21 too. And it also ignored the fact that ratings companies like  
22 Moody's focus on cash reserves and depleting cash reserves and  
23 what the consequences of that could be.

24 And that is a reduction in the hospital's ability to  
25 meet its outstanding obligations and borrow the capital

1 necessary to continue to invest in its future. And  
2 ultimately, as a result of St. Luke's financial performance in  
3 2008 and 2009 and Moody's downgrade of St. Luke's bond rating,  
4 St. Luke's violated its refunding bonds.

5 And at the time, St. Luke's had approximately  
6 \$8.3 million outstanding for the refunding bonds that the City  
7 of Maumee had issued on St. Luke's behalf. These were insured  
8 by Ambac (phonetic). At the time, Ambac issued a notice of  
9 default which actually gave Ambac the right to call the  
10 balance of the bonds. But the only way that Ambac granted a  
11 waiver of that default was the closing of this joinder with  
12 ProMedica.

13 St. Luke's financial performance and its operating  
14 losses also affected its ability to make necessary capital  
15 expenditures so that it could keep up with both patient care  
16 and healthcare reform. As you might be aware, healthcare  
17 reform requires quote-unquote meaningful use of electronic  
18 medical records, or EMR systems by 2015. And if a hospital  
19 doesn't meet that requirement, it will face cuts in its  
20 Medicare reimbursement.

21 Even with federal stimulus funds, St. Luke's did not  
22 have the capital that was required to purchase, to implement,  
23 or to support the infrastructure, systems and personnel  
24 required for an EMR. But that wasn't it. St. Luke's had a  
25 nurse call system that experienced regular downtime, and the

1 manufacturer no longer supported the system. But in August of  
2 2010, St. Luke's didn't have the \$700,000 available to install  
3 a new system, and, in fact, had deferred the installation of  
4 that system indefinitely.

5 Also, the radiographic surgery tables that surgeons  
6 at St. Luke's uses to guide them through certain procedures  
7 were beyond their useful life at St. Luke's. But, again,  
8 St. Luke's didn't have the \$450,000 necessary to invest in  
9 these assets.

10 Same is true for its air handler. It needed a new  
11 air handler for its heating and air conditioning system. It  
12 is beyond its normal life. But, again, St. Luke's didn't have  
13 the \$250,000 necessary to buy a new one and has deferred  
14 investment in it until 2012, which is risking heating and air  
15 conditioning outages at the hospital.

16 The 11 birthing beds -- there are 11 birthing beds  
17 that St. Luke's uses that are currently over 10 years old and  
18 are past their useful life. New beds would cost \$110,000, but  
19 this purchase has now been put off indefinitely because  
20 St. Luke's doesn't have the money to pay for it.

21 The same is true for a \$50,000 parking lot repair.  
22 St. Luke's didn't have the funds to be able to repair this.

23 And as you've heard a lot about, St. Luke's could not  
24 sufficiently fund its defined benefit or pension plan for its  
25 retirees. At the time of the joinder, St. Luke's faced an



1 unfunded pension liability of [REDACTED].

2 Can we go back for a second?

3 Let me be clear about one thing. We are not  
4 asserting a failing firm defense in this case. But the  
5 financial liability of St. Luke's at the time of the joinder  
6 is relevant, and it's relevant to the issue of St. Luke's  
7 competitive significance in this market. It's relevant to how  
8 St. Luke's was perceived by the market, other competitors, the  
9 payors, employees and the patients that it served.

10 And can we pull up the next slide but not show it to  
11 the gallery?

12 As you can see here in June of 2010, one of  
13 St. Luke's competitors recognized its financial difficulties  
14 and the consequences that those financial difficulties might  
15 have on St. Luke's business. I'm not going to name who this  
16 was, but I will quote part of it to you. And it says, there  
17 are multiple issues including theirs, St. Luke's, very poor  
18 financial help. Their pension obligations were unfunded by  
19 over [REDACTED], and year to date, they have an operating  
20 loss of [REDACTED]. Apparently, they have no action plan to  
21 deal with either one of these.

22 Even though, as the Plaintiffs have pointed out,  
23 St. Luke's has treated an increasing number of inpatients and  
24 outpatients, it still could not make up for this operating  
25 shortfall. And that's because the turnaround measures that

1 Dan Wakeman and St. Luke's tried to implement never solved the  
2 real problem. It never solved the fact that St. Luke's  
3 contracts with its commercial payors weren't covering its  
4 costs.

5 You heard a lot this morning about revenues. You  
6 heard a lot this morning about increasing in volumes, but you  
7 never heard anything about the other side of that coin, and  
8 that is what it took to pay for St. Luke's to provide those  
9 services.

10 Now, St. Luke's was unable to do what hospitals both  
11 in and out of Toledo are able to do in their contracts with  
12 commercial payors. They were able -- they weren't able to  
13 negotiate the best rates possible so that they could, at a  
14 minimum --

15 And let's pull up the slide but not show it to the  
16 gallery.

17 St. Luke's was unable to do what everybody else in  
18 and out of Toledo tried to do, which was get the highest  
19 possible reimbursement rates to cover their indirect and  
20 direct costs, but also allow it to generate a small operating  
21 margin that would allow the hospital to support indigent and  
22 charity care, as well as invest in its own future.

23 And as you can see by this slide, and I'll give you a  
24 chance to look at that --

25 THE COURT: All right. Thank you.

1 MS. CARLETTI: -- as well as the next one, which is  
2 another slide, that's the exact goal of what other hospitals  
3 in the area were doing.

4 Okay. Let's pull up now 16, please.

5 And like I said, you saw a lot this morning about  
6 revenues and the fact that in 2009, St. Luke's received just  
7 over [REDACTED] in total payments, but you never heard about  
8 the other side, which is that in 2009, it cost St. Luke's over  
9 [REDACTED] to provide those services. Ultimately, it had a  
10 [REDACTED] deficit between total reimbursements and total  
11 costs in 2009 alone.

12 That ultimately resulted in a cost coverage ratio of  
13 [REDACTED]. What does that mean? Well, for every dollar that  
14 St. Luke's spent on treating a patient, it only collected [REDACTED]  
15 [REDACTED]. And that was in 2009.

16 And what I want to point out about 2009 is that for  
17 the first half of 2009 St. Luke's was not in Anthem's network.  
18 It was receiving out-of-network rates from Anthem. And as  
19 you'll see in a little bit, Anthem was one of its top four  
20 payors. So ultimately, for the first half of the year it was  
21 receiving higher rates than what it ultimately got in the last  
22 half of the year.

23 And if you actually look at Anthem's cost coverage  
24 ratio for St. Luke's in 2010, a year in which St. Luke's was  
25 part of the Anthem network for the whole year, St. Luke's cost

1 coverage ratio with Anthem in 2010 was less than a hundred  
2 percent, [REDACTED].

3 So let's actually turn to the next slide and talk a  
4 little bit about payors. The one thing I do want to note is  
5 that St. Luke's cost coverage ratio in 2009 was [REDACTED].  
6 That's the year in which Dan Wakeman supposedly met most of  
7 his goals.

8 But the cost coverage ratio over time at St. Luke's  
9 had decreased. If you looked at 2006, St. Luke's cost  
10 coverage ratio for all of its payors was [REDACTED]. In 2009,  
11 that decreased to [REDACTED].

12 Now, that [REDACTED] cost coverage ratio in 2006  
13 includes Medicare, Medicaid, Charity Care, entities that  
14 St. Luke's doesn't negotiate its reimbursement rates. So if  
15 you actually take those out, you take out Medicare, Medicaid  
16 and Charity Care, St. Luke's cost coverage ratios from 2006 to  
17 2009 follow the exact same trajectory.

18 In 2006, the cost coverage ratio, excluding those  
19 entities, was [REDACTED], and that dropped to [REDACTED] in  
20 2009.

21 Ultimately, what does that mean? Well, St. Luke's  
22 commercial contracts were unable to contribute towards its  
23 cost, and it was insufficient to support Medicare, Medicaid  
24 and Charity Care, as well as St. Luke's investment in its  
25 future.

1           And that's significant, because as you can see here,  
2 out of the total pool of St. Luke's largest payors and the  
3 charges that it made for general acute care medical services,  
4 in 2009, [REDACTED] of its total charges for general acute  
5 medical services were with four payors: Medicare, Medicaid,  
6 and then its two largest commercial payors, MMO and Anthem.

7           And in 2009, three of those payors had cost coverage  
8 ratios less than a hundred percent. And as we were just  
9 talking about a few minutes ago, Anthem was above a hundred  
10 percent, although that number reflects the fact that it  
11 received higher out-of-network rates for the first half of the  
12 year, and if you look at its 2010 number, it also is below a  
13 hundred percent.

14           And I want to use MMO as a quick example to show you  
15 this decline in the trajectory of the cost coverage ratios and  
16 how things just got worse even after Dan Wakeman came in with  
17 his turnaround plan.

18           In 2006, MMO's cost coverage ratio was [REDACTED].  
19 It was meeting its costs but it was just barely doing it. In  
20 2009, that dropped to [REDACTED]. And this also happened with  
21 most of St. Luke's other payors. You have the exact same  
22 trajectory downward.

23           And, again, as I note here on the slide, the Anthem  
24 numbers for 2009, again, are just over a hundred percent, but  
25 those reflect out-of-network rates.

1 I'd like to show you this point in another way, which  
2 ultimately is that St. Luke's couldn't cover the cost of care  
3 for its services. And I'll break this out by inpatient and  
4 outpatient.

5 In 2009, MMO, St. Luke's largest commercial payor, on  
6 average for every inpatient that St. Luke's saw, it lost over  
7 [REDACTED]. For every outpatient it made [REDACTED].

8 For Anthem, if you look at its in-network rates from  
9 July 1st, 2009, to December 31st, 2009, on average for every  
10 inpatient that St. Luke's saw, it lost over [REDACTED], and the [REDACTED]  
11 per outpatient it made was nowhere near able to cover that  
12 deficit.

13 In general, St. Luke's inpatient rates were  
14 approximately [REDACTED] percent below market average on a per diem  
15 basis and [REDACTED] percent on a case rate basis.

16 In St. Luke's situation, where its inpatient rates  
17 were so far below market and its cost coverage ratios for  
18 commercial payors were below a hundred percent, any increase  
19 in patient volume, no matter how high it was, and the focus of  
20 the Plaintiffs of increase in revenue and increase in volume  
21 doesn't take this into consideration. Any increase in volume  
22 was not going to make up this difference, it just wasn't.

23 THE COURT: To what do you attribute the tremendous  
24 differential in inpatient?

25 MS. CARLETTI: I think just the higher cost and the

1 inability to recover those costs and the rates that they were  
2 receiving.

3 THE COURT: Inability --

4 MS. CARLETTI: Uh-huh.

5 THE COURT: Inadequate negotiating ing posture.

6 MS. CARLETTI: That, and the fact -- and this is  
7 exactly what I was getting to. When St. Luke's went to these  
8 commercial payors, when it realized this problem, it went to  
9 MMO and Anthem and it said, look, we need to increase our  
10 rates. We need to do it so we can continue to remain a viable  
11 stand-alone community hospital. And MMO and Anthem told them  
12 no, they weren't significant enough, they weren't going to do  
13 it. They weren't going to increase those rates.

14 And you know, the intent in those negotiations was to  
15 simply secure interim rate increases that would at least cover  
16 St. Luke's cost of treating Anthem and MMO patients. And the  
17 intent there was to increase those rates 'til the end of the  
18 contract and then sit down again and try to increase those  
19 rates once again. Because fundamentally this was the problem.  
20 It wasn't trying to cut costs. You know, they tried to cut  
21 costs. It didn't work. And ultimately, the problem here was  
22 trying to get those reimbursement rates up. And it didn't  
23 work.

24 And once St. Luke's and Dan Wakeman realized that and  
25 tried to fix it, they couldn't do anything else. You know,

1 this is what I was moving into next, but they looked at other  
2 options. They looked at reducing their workforce. They  
3 looked at reducing salaries and wages by \$6 million and  
4 reducing their benefits by 31 percent. But it wasn't going to  
5 get them to break even.

6 They looked at cutting these services, obstetrics,  
7 cardiac services, the diabetes center, you know, all of these  
8 services where the reimbursements and the revenues that  
9 St. Luke's took in under its payor contracts didn't positively  
10 contribute to its finances.

11 But even cutting these services wouldn't have taken  
12 St. Luke's to a break even point. And, in fact, it would have  
13 detrimentally affected the community. It would have resulted  
14 in a reduction of 25 percent of St. Luke's staff.

15 So in the end, St. Luke's was bleeding. And in the  
16 words of Dan Wakeman, as of December 15th 2009, St. Luke's was  
17 in a dire financial position. It couldn't change its rates  
18 with its payors.

19 Now, obviously the Plaintiffs dispute this, and based  
20 upon their expert's analysis, they argue that St. Luke's was  
21 going to turn the tides, it was going to have positive --  
22 operate in positive cash flows and it was going to be able to  
23 do that through 2013. I would submit to you that these  
24 conclusions are really sensitive to the assumptions that Dagen  
25 makes in coming up with these projections.



1           One of which was the fact that St. Luke's expenses  
2           were only going to grow by about three percent. And this  
3           projection, from what I understand of it, is based upon some  
4           document that Mr. Dagen reviewed that he said was a St. Luke's  
5           document, but I'll submit to you that I have no idea what that  
6           document is. I have no idea who created it. We don't know  
7           why it was created, when it was created, whether it was  
8           official budgeting document, frankly, what the document even  
9           is.

10           And that's because in his analysis, Mr. Dagen never  
11           talked to anybody at St. Luke's about it. And in all those  
12           depositions and investigational hearing transcripts that  
13           Mr. Reilly told you he's submitting as part of this hearing,  
14           in not a single one of those did the Plaintiffs or the FTC  
15           ever ask any St. Luke's employee about this purported  
16           document.

17           And so it's -- in other words, these financial  
18           calculations and the prediction that Plaintiffs have and that  
19           their expert has that, you know, things were going to get  
20           better for St. Luke's, are based off of some document that  
21           their expert has never independently verified.

22           You know, it's significant, because when these  
23           assumptions don't really fit with reality -- and, Mike, if you  
24           can pull back slide two -- it's clear looking at this and  
25           looking at, you know, operating income and the losses, from

1 2007 through 2009, St. Luke's expenses rose faster than its  
2 revenue. And that was continuing in 2010.

3 So this notion to suggest that all of a sudden what's  
4 happened over the last three years -- and, you know, if you  
5 look back, the last five years, to suggest that this was going  
6 to change dramatically and things were going to be okay for  
7 St. Luke's, it -- it should have given Mr. Dagen pause.

8 You know, the evidence here belies the fact that  
9 St. Luke's would have achieved the dramatic turnaround that  
10 the Plaintiffs are arguing would happen here.

11 You know, if we can go to -- there we go.

12 Even Dan Wakeman himself admitted that although he  
13 was successful with many of these three-year goals, he was  
14 unable to meet very -- one very important goal, and that was  
15 financial performance.

16 No one here is saying that Mr. Wakeman didn't do a  
17 good job, but in the end, St. Luke's was unable to fix the  
18 real problem that it had, which was its inability to cover the  
19 cost of its inpatient care with its current commercial  
20 reimbursement rates, and it particularly couldn't fix that  
21 problem when the payors wouldn't negotiate with it.

22 You know, at the time of this joinder, St. Luke's  
23 faced a competitive market with weak demographics, declining  
24 volume trends, high unemployment, low median incomes and  
25 reimbursement rates that just didn't keep up with the cost of

1 providing inpatient care.

2 And as you'll see by his very own words, as  
3 Mr. Wakeman predicted, in the end, notwithstanding all other  
4 events, if St. Luke's had to stand alone in August of 2010,  
5 the hospital would have been out of business in three to four  
6 years.

7 So if you don't have any other questions, that's it.

8 THE COURT: Leave that up for a minute.

9 Thank you.

10 We'll take a 10-minute break now.

11 (A recess was taken from 3:13 p.m. to 3:25 p.m., after  
12 which the following proceedings were had:)

13 THE COURT: Thank you, ladies and gentlemen. Please  
14 be seated.

15 Go right ahead, Mr. Marx. I can hear you from here.

16 MR. MARX: I want to spend the next 40 or 45 minutes,  
17 if I can contain myself, talking about the nature and history  
18 of competition in the relevant markets that the Government has  
19 alleged, and the competitive effects of the joinder on those  
20 markets. And there are several reasons why the market shares  
21 and concentration levels on which the Government focuses are  
22 not enough to establish a likelihood that the Plaintiffs can  
23 prove that the joinder will violate Clayton Act, Section 7.

24 First, ProMedica and Mercy are each other's closest  
25 competitors in the Toledo market for general acute care

1 inpatient and OB services. And, as such, Mercy will constrain  
2 ProMedica's ability to exercise market power if it dared to  
3 try.

4 Second, St. Luke's simply isn't in the same  
5 competitive sphere as Mercy and ProMedica are. It does not  
6 offer any unique services. It doesn't have a unique location  
7 that make it a must-have for employers or payors. And if you  
8 look at the declarations that the Government provided and even  
9 some that we provided, you'll see they almost all describe  
10 Mercy or ProMedica as a must-have system. UTMC is a must-have  
11 system because of the high level tertiary and quaternary care,  
12 q-u-a-t-e-r-n-a-r-y, I think.

13 But St. Luke's is never described as a must-have  
14 system. It's not in the same competitive sphere as ProMedica  
15 and Mercy.

16 THE COURT: Well, true, but both Mercy and ProMedica  
17 have, or have had, or are in the process, I would guess, of  
18 seeking land for expansion in southwest Toledo, southwest  
19 Lucas County, because of their absence from that quadrant.  
20 And what impact will that have on the community, St. Luke's,  
21 and the remaining three competitors?

22 MR. MARX: You're exactly right. ProMedica has land  
23 at Arrowhead, Mercy has land, Strayer land, and of course,  
24 UTMC is located right there anyway. And they're expanding in  
25 various different ways, and they each have strategies for

1 addressing the southwestern portion of the marketplace to try  
2 and attract more patients from there.

3 And as Mercy and ProMedica expand their operations,  
4 expand the range of services and the way that they deliver  
5 services in the southwestern portion, they will continue to  
6 constrain each other. They're not going to be able to  
7 exercise market power. They're not going to be able to raise  
8 prices above competitive levels because they're right there  
9 competing against each other.

10 The effect on St. Luke's, however, would be that  
11 St. Luke's would find it harder -- even harder to compete than  
12 its found itself so far. And that is because it doesn't offer  
13 anything unique.

14 Is Maumee a desirable part of the marketplace?  
15 Absolutely. But let's be clear about this. While the  
16 Government wants you to focus on St. Luke's core service area  
17 where it draws 90 percent of its patients, the reality is  
18 that's just a part of the relevant market. And if they're  
19 going to define the relevant market as Lucas County, what  
20 they're essentially saying is from a patient's perspective,  
21 any of the hospitals in Lucas County are reasonably  
22 interchangeable with each other. So if a patient wants to go  
23 to St. Luke's but for some reason ProMedica attempts to raise  
24 St. Luke's rates above competitive levels, well, they can go  
25 to Mercy Hospital that's in Lucas County, they can go to UPMC.

1 They may prefer, patients may prefer to go to the closest  
2 hospital.

3 But let me just give you --

4 THE COURT: Unless they're driven by the payor.

5 MR. MARX: But payors can, and will, if they need to,  
6 incentivize patients to seek the lower-cost provider.

7 For example, we know, we know that -- what's the best  
8 way to put this without disclosing information I shouldn't be  
9 disclosing? We know that there is a parent of somebody who --  
10 of a competitor in Toledo that actually does have as part of  
11 its health plan, tiering. So it encourages its members to go  
12 to hospitals that are lower cost by covering a higher  
13 percentage of their healthcare than if they go to, say, a  
14 second tier provider in the network.

15 We know that there's another payor, because the  
16 depositions last week disclosed it. I won't tell you who it  
17 is publicly, but I'll tell you who it is privately in the  
18 stuff we submit, that has a pilot program now that's intended  
19 to incentivize and steer. I don't like the use of that term,  
20 but that really is -- to steer patients to lower cost  
21 providers.

22 We know that even -- and I can't remember whether  
23 it's -- and this is a matter of public record so I'm not going  
24 to be disclosing anything confidential -- I don't remember if  
25 it's Anthem or MMO that has some feature on its website that

1 allows patients to check and see which of the providers in its  
2 network is lower cost. Now, is that a steering mechanism?  
3 Not yet, but it's the first step in trying to, I think,  
4 condition members to think more about the cost of the care  
5 that they're seeking.

6 And the problem here for St. Luke's, as the  
7 competitors respond, is that -- and that's what -- and that's  
8 what Mercy and ProMedica are doing as they expand their  
9 operations in southwest Ohio, the payors will have the ability  
10 to steer their members. And they're not going to need to  
11 steer them to St. Luke's because they can't -- they can get  
12 everything they want from somebody else. And that's really  
13 been the problem.

14 And payors are well equipped to defeat any attempt by  
15 ProMedica to exercise market power. We know, we know that  
16 payers have demonstrated the ability to market a network  
17 without one of the two multi-hospital systems. They've done  
18 it in the past, and there's no reason to believe that they  
19 couldn't do it in the future if ProMedica attempts to raise  
20 St. Luke's prices to anticompetitive levels.

21 And, again, while the Government downplays it, the  
22 fact that there is excess capacity in the market in place, and  
23 the fact that physicians in Toledo -- and this is a little bit  
24 different than you find in, I think, lots of other cities  
25 where I've been involved in investigations -- physicians in

1 Toledo are members of all the -- they practice at all the  
2 hospitals, and they actually practice at all the hospitals.  
3 They're credentialed there. Not all of them at all of them,  
4 but a lot of them at all of them.

5 And what that means is if a payor has a patient and  
6 that patient's physician probably has the ability to treat the  
7 patient at a Mercy hospital or at a ProMedica hospital or UPMC  
8 and maybe even St. Luke's, so if ProMedica tries to increase  
9 rates the payor can say, look, you don't have to change your  
10 physician, your physician can treat you at Mercy.

11 THE COURT: It's changing again, as it did 15, 16  
12 years ago, because of the acquisition of practices and as part  
13 of those acquisitions saying you may only admit to this  
14 hospital.

15 MR. MARX: Fair point.

16 And, you know, we checked that, because we wanted to  
17 know whether or not with, for example, Mercy's employed  
18 physicians -- and as you know, they employ about a hundred,  
19 and they're acquiring more physician practices.

20 UPMC, of course, has its faculty practice plan, and  
21 it employs those physicians.

22 And, of course, ProMedica's physician group employs a  
23 couple of hundred private primary care and specialty  
24 physicians.

25 But we checked to see whether or not even those



1 employed physicians were credentialed and practiced at other  
2 hospitals, and frankly surprising to me, but true, they do.  
3 So ProMedica doesn't restrict its physicians from practicing  
4 at other hospitals. Indeed, many physicians from the  
5 ProMedica physicians group practiced at St. Luke's before this  
6 joinder, just like they admit some patients to Mercy. Same  
7 thing is true for some of the Mercy physicians. That's one of  
8 the unique characteristics about the Toledo market that make  
9 this market share and concentration analysis that the  
10 Government wants to rely on less -- an inadequate predictor of  
11 future competitive performance.

12 In other situations, other markets, I might say,  
13 well, that might be a factor. But separately, as well, of  
14 course, there are -- there remain lots of independent  
15 physicians who have privileges at multiple hospitals and will  
16 treat patients.

17 And one of the things that we see, there was a  
18 study -- in our post-trial findings, I'll get you the --  
19 there's too many things for me to remember to give it to you  
20 precisely -- but there was a study as to why it is that  
21 patients select their hospitals. And the most important  
22 criteria was not the hospital I think is what this showed,  
23 it's the physician. And one of the beauties about this market  
24 is, the physicians practice in multiple hospitals.

25 So it's not a situation where ProMedica can say take

1 us or you don't get treated. You can take us, and if you take  
2 us you can get treated at our hospitals and now St. Luke's,  
3 and payors have the ability to say, no, you're trying to  
4 charge us too much, and their members' physicians will still  
5 be able to admit their patients someplace else.

6 THE COURT: Sorry to interrupt.

7 MR. MARX: No, that's okay. Anytime you have a  
8 question.

9 There's simply no evidence here -- oh, I started to  
10 talk about the excess capacity. The excess capacity is  
11 important because it demonstrates that if ProMedica and  
12 St. Luke's, after the joinder, can't reach an agreement with a  
13 payor, the excess capacity establishes that the payor-- the  
14 other hospitals could pick up the slack and treat the patients  
15 from -- that otherwise ProMedica or St. Luke's would treat.  
16 The payor doesn't need to worry about where am I going to send  
17 my patients. There's plenty of excess capacity at Mercy and  
18 UPMC.

19 Using raw market share percentages to infer market  
20 power, Your Honor, simply overstates St. Luke's competitive  
21 significance. The reality is -- I don't like to say it this  
22 way, but it's true -- St. Luke's has been a bit player in a  
23 market where ProMedica and Mercy are the major players. This  
24 market has an overabundance of capacity, which, by the way,  
25 increases costs.

1           So you wonder why it is, why it is that costs may be,  
2           or appear to be higher in Toledo? It's because we have excess  
3           capacity. We're over-bedded there. And when you have more  
4           beds than you're filling, and you're staffing those beds, you  
5           have a cost that you're not recovering for because you're not  
6           treating patients. Or if you're treating the Medicare and  
7           Medicaid patients, you're not getting compensated for the  
8           cost.

9           And the simple truth is Toledo can't continue to  
10          support four independent hospitals and systems. It's just not  
11          big enough. ProMedica's commitment to continue to maintain  
12          and operate St. Luke's as a locally managed and controlled  
13          community hospital will benefit that market.

14          THE COURT: Are you getting your cost figures? Are  
15          you using cost figures from the published costs, or are you  
16          using what they're actually charging to those covered by an  
17          insurer who is part of a plan?

18          MR. MARX: We're looking at two elements. In terms  
19          of the development of the cost coverage ratio, we look at the  
20          direct and indirect costs of providing the care from our  
21          financial statements and those of St. Luke's. Plus, we look  
22          for a margin.

23          On the revenue side, we're looking at what we  
24          actually collect from the payors. That's the way that --

25          THE COURT: Fine; thank you.

1 MR. MARX: We've talked some about this. You're  
2 familiar with this. I'll try and click through this a little  
3 bit quicker. Again, you haven't heard as much about Mercy,  
4 you know a lot about Mercy, but I have to protect the record a  
5 little bit here. So Mercy, as you know, operates three  
6 hospitals in Toledo which are proximately located to the -- to  
7 ProMedica. You're familiar with the area, so you're more  
8 familiar with the area than me. We've got the Toledo  
9 hospital, of course, which is the flagship hospital, appears  
10 to be located a little bit more centrally up in the north.

11 A little bit north of there we have Flower Hospital.  
12 Of course, St. Anne Mercy is located approximately to Flower.  
13 St. Vincent Mercy Medical Center, Mercy's flagship hospital is  
14 located not far from the Toledo Hospital and then I guess east  
15 of the river we have St. Charles Mercy and Bay Park.  
16 St. Luke's, of course, is located in that green dot on the  
17 south.

18 Now, the Mercy and ProMedica hospitals offer similar  
19 services. They compete vigorously to attract patients to  
20 those services. The Toledo hospital and St. Vincent both  
21 provide sophisticated tertiary services, both have a trauma  
22 unit and a children's hospital on campus.

23 There's evidence, Your Honor, that Mercy is able to  
24 and poised to respond to ProMedica's expansion into the  
25 southwest, more directly into the southwest segment of Toledo.

1 And given the history of ProMedica's and Mercy's rivalry, it's  
2 not surprising, as you point out, that Mercy already owns land  
3 just 2 miles from St. Luke's at Strayer Road in at Monclova  
4 Township. And it is well positioned -- it's their words, not  
5 mine -- to move forward with its plans to expand its services  
6 in southwest Toledo.

7 Indeed, we know that Mercy has already received site  
8 plan approval to construct a new 73-bed hospital. It might  
9 not have plans to do that right now, but it doesn't need to  
10 build a new hospital to be able to compete effectively in the  
11 southwest. It simply needs to add a couple of primary care  
12 physicians for example.

13 I don't know if it's doing that or not, but I  
14 wouldn't be surprised if it was. If it adds a couple of  
15 employees, a couple more primary care physicians, then all of  
16 a sudden it's better able to compete with ProMedica and  
17 St. Luke's after the joinder than perhaps it was before.

18 Now, ProMedica and Mercy have been head-to-head  
19 competitors in every important dimension. And here, I will  
20 take the slide.

21 Each offers a full array of general acute care  
22 inpatient services, including the most advanced services. Not  
23 quite as advanced perhaps as UTMC, but more advanced than what  
24 St. Luke's offers.

25 Each offers general acute care services in three

1 separate but overlapping locations. Each has taken steps to  
2 reposition their services on a systemwide basis so as to  
3 deliver their services more efficiently and cost-effectively,  
4 as the demographics of the Toledo area have changed.

5 Let me provide an example, because it's something  
6 that St. Luke's can't do, Your Honor, on its own. Mercy  
7 eliminated high quality OB services at St. Anne's. It used to  
8 provide OB services at St. Anne's, and it eliminated them  
9 there because St. Anne's didn't attract enough patients to  
10 sustain a profitable OB service.

11 Instead, what Mercy did was consolidate its OB  
12 services at St. Charles and at St. Vincent. That's the kind  
13 of repositioning, reconfiguration of services that Mercy could  
14 do because it had three hospitals. And if it couldn't reach  
15 minimum efficient scale, as the economists like to call it, at  
16 St. Anne's delivering babies, then it could take that  
17 underutilized capacity, consolidate it at St. Charles and at  
18 St. Vincent and free up the beds at St. Anne's to provide a  
19 different service. That's what we call repositioning.

20 The problem for St. Luke's is, as Ms. Carletti told  
21 you, when the OB services line is losing money because it  
22 isn't delivering enough babies to be able to be profitable, or  
23 the cardiovascular surgery service line is unprofitable  
24 because they're not doing enough cases to be profitable,  
25 St. Luke's has only one option. They have to close the

1 service or continue to offer it unprofitably.

2 With ProMedica, they will have the opportunity to  
3 consolidate and achieve cost savings that it couldn't do by  
4 itself. And ProMedica engaged Navigant to analyze how  
5 ProMedica and St. Luke's can best combine their services in a  
6 manner that's cost effective and efficiently serves the  
7 community. That's what Navigant was brought in to do.

8 And one specific example that the FTC has already  
9 approved is the consolidation of inpatient rehab services at  
10 Flower Hospital. St. Luke's had underutilized inpatient  
11 rehab -- we've talked about this a little bit. Rehab  
12 services, they weren't using all of it. Flower,  
13 unfortunately, had a similar situation.

14 By shifting the underutilized rehab beds from St.  
15 Luke's to Flower, ProMedica and St. Luke's are enhancing  
16 Flower's rehabilitation services, that's good for the  
17 community, and they're allowing St. Luke's to re-purpose the  
18 newly opened space to accommodate more medical surgical beds.

19 Directly in the market that for reasons that I don't  
20 quite understand, the FTC somehow thinks we're going to  
21 change.

22 The increase in med surge beds will allow St. Luke's  
23 to accept more patients that present to its emergency room and  
24 reduce a sometimes unfortunate and unfortunately high  
25 emergency room diversion rate. And as you know, if the beds

1 in the hospital are filled, then a hospital can't accept new  
2 patients into its emergency room because it has no place to  
3 put them when they leave the emergency room. That's what  
4 happens when you get diversion. St. Luke's has had that  
5 problem periodically.

6 Changes like that are not the kind of actions  
7 St. Luke's can do on its own. It doesn't have the other  
8 facilities to be able to generate those kinds of efficiencies.  
9 And that inability to reposition and realign its services is  
10 one of the reasons that St. Luke's considered eliminating  
11 unprofitable service lines, like OB, cardiac services, its  
12 diabetes center, cardiac and pulmonary rehab and tobacco  
13 treatment.

14 With ProMedica, St. Luke's can realign its services.  
15 That's one of the pro-competitive benefits that St. Luke's  
16 joinder with a local system as opposed to a Cleveland Clinic  
17 or somebody from Detroit might provide.

18 Now, the parties themselves, third parties, I'm  
19 sorry, recognize that ProMedica and Mercy are each other's  
20 primary competitors.

21 One of the payors during a deposition that the FTC  
22 took said, and I won't identify who it is, in response to the  
23 question:

24 In your view, are there particular hospitals that  
25 compete more closely with each other than with a broader range



1 of hospitals?

2 Answer: I think the ones I mentioned previously, the  
3 lineup between ProMedica and Mercy, and they're very  
4 competitive.

5 No surprise, no surprise. Take a look at how they  
6 line up.

7 Although, ProMedica and Mercy are the predominant  
8 competitors in Toledo, they face stiff competition -- we  
9 haven't heard much about these guys either -- from UTMC.

10 UTMC is an academic teaching hospital that offers  
11 almost the same primary and secondary care inpatient hospital  
12 services as Mercy and ProMedica and St. Luke's, with the one  
13 exception of OB services. UTMC, as we've said, is the only  
14 hospital to offer certain sophisticated quaternary services.

15 St. Luke's doesn't have anything unique to offer. It  
16 provides general acute inpatient care services with only  
17 limited tertiary offerings. I can show you an example of this  
18 with the next slide, the top 15. There we go.

19 Slide seven lists the top 15 diagnostic related  
20 groups for St. Luke's in order of the number of -- I think  
21 it's the number of commercial discharges.

22 So for OB, I think the number was, gosh, one a day  
23 would be about 366 or so commercial discharges.

24 And you can see as you work down that list of DRG  
25 groups, with the exception of newborns, where UTMC doesn't

1 offer the service and St. Anne doesn't anymore, every other  
2 hospital in the market that the Government has alleged,  
3 including Wood County, which I understand is in Wood County,  
4 but I leave up there only because it offers OB services, as  
5 well, every other hospital offers the same basic services.  
6 St. Luke's offers nothing unique.

7 In addition -- next slide, please.

8 The services that St. Luke's is offering, and this is  
9 a little messy to read but I'll try to explain it to you, are  
10 generally, as you would expect, not as complex as the services  
11 that are offered by the competing hospitals. And the way that  
12 you can tell this, although it is a little messy, is  
13 St. Luke's is always represented with respect to each of the  
14 DRGs listed on the -- DRG groupings listed on the left-hand  
15 side, it's the first of the four bars. And what this slide  
16 depicts is the level of complex -- average level of complexity  
17 of care delivered by the hospital with respect to that  
18 particular service line.

19 So if we look, for example, at, well, pick eye care  
20 as a better example, the nervous system for the point I want  
21 to make, you can see that St. Luke's hospital has the lowest  
22 of the level of acuity, average level of acuity for the four  
23 different systems in the market.

24 Same thing is true for ear, nose, mouth, and throat.  
25 Gosh, it's also true for respiratory system, true for

1       circulatory system, not quite true for digestive system.

2               And then there's another slide, as well, that I think  
3       shows a few more of these. And, again, for most of the  
4       services that are depicted, St. Luke's acuity of care,  
5       complexity of care is a little bit lower.

6               THE COURT: You do recognize that certain judges are  
7       red-green colorblind?

8               MR. MARX: That's why I wanted to tell you, Your  
9       Honor, that St. Luke's is the one on the top, and to the  
10      extent that its line doesn't extend that far to the right, it  
11      proves my point.

12              I live with someone who's colorblind, Your Honor, a  
13      little bit colorblind. You can imagine what it's like trying  
14      to pick out clothes.

15              St. Luke's, besides not offering patients a unique  
16      set of services, also doesn't offer patients a unique location  
17      that would make it a must-have provider. None of the hospital  
18      facilities in Toledo are more than a 25-minute drive from each  
19      other, and they're all pretty well connected by highways.

20              As a practical matter, St. Luke's location is not so  
21      important or distinct as to require its inclusion in a  
22      network.

23              And I can't help but point out if St. Luke's had  
24      something that was unique, if it was so important to payors in  
25      Toledo, then you would see its market share be higher. And,

1 frankly, I would think that you would have seen the rates that  
2 it was charging before higher, because it would have been more  
3 valuable than it was. You don't see that.

4 And if we look at -- if we look at -- and the  
5 Government likes to focus on this a lot, where it is that  
6 St. Luke's draws its patients from, it draws them from a very  
7 narrow area. Now, I know this doesn't look like a narrow  
8 area, but I'll explain to you how we get there in a minute.

9 This is most of Lucas County, but it's St. Luke's  
10 90 percent service area. This is where it draws 90 percent of  
11 its patients. As a practical matter, I think if we focused it  
12 even more, you'd see that most of the patients are drawn from  
13 a core service area closer in around the hospital.

14 But if you compare where St. Luke's draws its  
15 patients from with, say, where -- what's the next one that you  
16 want to bring up -- oh, let's compare it to Mercy. We've  
17 overlaid Mercy's 90 percent service area on top of St. Luke's.  
18 So all of the red and purple -- well, I'll tell you, this  
19 right here -- well, you can't see that. That blue is the area  
20 that represents part of St. Luke's 90 percent service area  
21 from which -- it isn't part of Mercy's 90 percent service  
22 area. The point of this chart is to show you Mercy dwarfs --  
23 Mercy's 90 percent service area dwarfs St. Luke's 90 percent  
24 service area. It draws from a much, much wider area.

25 I could show you the same things, but I'm not. I

1 could show you the same things for UTMC, and for ProMedica.

2 But instead, I want to focus you on what I think is slide 17.

3 No, it's not slide -- yeah, there we go, slide 17.

4 Let's back up to slide 16. Slide 16 shows the total  
5 discharges within St. Luke's 90 percent service area for the  
6 DRGs in which St. Luke's has three or more commercial  
7 discharges. This was in 2008.

8 And the point of this slide is to show you that  
9 within that 90 percent service area where St. Luke's draws  
10 90 percent of its patients, it had 2573 commercially-insured  
11 admissions. But Mercy had, gosh, more than twice as many from  
12 that same area. And ProMedica had even more.

13 The point here is that Mercy is the smallest -- I'm  
14 sorry, St. Luke's is the smallest, even within the service --  
15 the 90 percent service area from which it's drawing its  
16 patients.

17 Let me see if I can show you, as well, what this  
18 means in terms of patients' willingness to travel from  
19 St. Luke's primary service area to outside.

20 And if you look at this chart, the red on the left  
21 represents sort of the -- the map represents, is intended to  
22 depict the number of patients who travel, frankly, from west  
23 to east, who are willing to leave where St. Luke's is located  
24 to get care further away. And what we see generally for  
25 general acute care patients is -- and this is -- St. Luke's as

1 compared to Mercy, as it turns out, there were 802 discharges  
2 from July 2009 until March 2010 that, from Mercy on the east,  
3 of patients who came from the western part of this geographic  
4 market.

5 In contrast, St. Luke's only drew 238 patients to  
6 itself from the eastern part. So patients are willing to go  
7 from St. Luke's primary service area outside to where Mercy  
8 and ProMedica and UTMC have their hospitals.

9 So this travel issue is not -- it's just not a big  
10 deal. Patients will go where they need to go to get care.

11 THE COURT: But within the 90 percent area. A  
12 combined would be 68 to 32.

13 MR. MARX: Well, in this 90 percent area, the area  
14 that we're looking at represents the area from which  
15 St. Luke's draws 90 percent of its patients. This isn't  
16 really market share. This is -- so that's the . . .

17 Now, if we -- if we focus on the fact -- we turn now  
18 to the question of whether or not St. Luke's really is  
19 ProMedica's primary rival. We've talked some already about  
20 the fact that St. Luke's has a low volume of  
21 commercially-insured patients. Most of its discharges --

22 Next slide, I think.

23 Most of its patients -- keep going. No, back up.  
24 There you go.

25 Most of St. Luke's patients are government paid

1 patients. Sixty-three percent of St. Luke's inpatient  
2 discharges in 2007 were government pay, charity or other care.  
3 Only 36.4 percent of St. Luke's patients were commercially  
4 insured in 2007, 3700 patients, about 10 a day.

5 In 2008, the payor mix deteriorated a little bit for  
6 St. Luke's. The commercial pay, commercially insured patients  
7 dropped from 36.4 to 35.4. And this is a trend I don't think  
8 the Government's going to point you to.

9 In 2009, the payor mix deteriorated again for  
10 St. Luke's when its commercially insured patients dropped to  
11 34.7 percent.

12 And that's important, obviously, because the  
13 Government pay patients have a lower cost coverage ratio than  
14 even the low cost coverage ratio that St. Luke's was getting  
15 for commercial pay patients, which means that it has -- that's  
16 what creates the -- that's what created the big long red bar  
17 that Ms. Carletti was showing.

18 Now, with respect to OB services -- let's flip a  
19 couple slides down then. There we go.

20 With respect to OB services, newborns delivered in  
21 2009, St. Luke's had only 353 commercially-insured newborn  
22 deliveries. Again, less than one a day. Now, interestingly  
23 about this number -- let's go back one. We should have a  
24 total discharges, don't we? Do we have total newborn  
25 discharges back one, or no? Yes, we do.

1           This slide, Your Honor, represents St. Luke's total  
2 newborn discharges in 2009. It shows that they -- there were  
3 527 babies born at St. Luke's altogether.

4           In order to be able to run a profitable OB program,  
5 newborns program, you need 700 to 800 deliveries. St. Luke's  
6 isn't anywhere near the minimum efficient scale required to  
7 have a profitable OB program. And, of course, of these 527  
8 newborns, the next slide should show you -- I thought we had  
9 the 353. There you go. 353 were commercially insured.

10           Now, I know that the Plaintiffs are going to cite to  
11 you Mr. Wakeman's statements regarding the volume of OB  
12 patients at St. Luke's being so great that they didn't have  
13 enough rooms to provide services to its patients. You should  
14 be aware that in March 2010, there were more babies born at  
15 St. Luke's in any one month than had ever been born there  
16 before, as best we can tell, and have been born there since.  
17 So in March 2010 it's true, they were working at capacity for  
18 OB services for newborns.

19           Now, the other point that's important, however, is  
20 that St. Luke's is the only hospital in Toledo that has OB  
21 beds that are unstaffed. All of the other hospitals in Toledo  
22 that deliver newborns staff their -- that section of the  
23 hospital at a hundred percent of their licensed beds.  
24 St. Luke's didn't. So it actually -- had it staffed those  
25 beds at a hundred percent instead of what it was doing, it



1 would have had more capacity. It wouldn't have been bursting  
2 as much as . . .

3 Now, to suggest that the joinder will grant ProMedica  
4 newfound market power to demand anticompetitive rates ignores  
5 the realities of payor networks in Toledo. Payors have  
6 leverage to negotiate favorable rates. They have more  
7 leverage based on the size of their membership and thus the  
8 amount of dollars they pay to a particular hospital. That  
9 comes as no surprise. The bigger the payor, the better the  
10 rates it's going to be able to negotiate.

11 And we know from past experience that the payors have  
12 been able to market networks that didn't include all of the  
13 providers. Until 2008, that's the way it was. MMO contracted  
14 with Mercy, UTMC and St. Luke's, Anthem contracted with  
15 ProMedica and UTMC. And, of course, ProMedica Paramount  
16 contracted with ProMedica and UTMC, as well.

17 And all of these plans were successful. They all  
18 grew, they were able to market their health plans to employers  
19 successfully in the marketplace.

20 Interestingly enough, there were some plans that were  
21 open network that had all four providers. And you would  
22 think, you would think that if having open access was so  
23 important, plans like Aetna, for example, would have been much  
24 more successful than they've turned out to be. They had all  
25 the hospitals in their network. But for whatever reason, they

1 weren't able to increase their market share terribly much.  
2 Were they able to compete? Yes, but as a practical matter, I  
3 think their market share now may be what, about, what are we,  
4 nine or 10 percent? There should be a pie chart there  
5 someplace that will reflect that, and I will find it for you.  
6 Twenty-eight. Aetna's eight percent.

7 And for all this period of time, even when the others  
8 only had -- only had networks consisting of one of the two big  
9 systems, and UPMC, or and UPMC and St. Luke's, Aetna had them  
10 all. I think Frontpath may have had them all, too. And they  
11 weren't able to demonstrate -- St. Luke's certainly didn't add  
12 enough for them to increase their share to the level that MMO,  
13 Anthem and Paramount had attained with their narrower  
14 networks.

15 So the whole notion that it would be impossible for  
16 payors to market a narrower network today, well, I don't  
17 disagree with the notion that consumers prefer more choice.  
18 If the tradeoff is between choice or having to pay more, I  
19 think Paramount's success demonstrates that employers are  
20 willing to take a little bit less choice if that's the option.

21 Give me just a moment, Your Honor. I'm trying to see  
22 what I can skip that we've already covered. I keep stealing  
23 my colleague's time, and I'm cognizant of the 5:00 o'clock  
24 hard stop.

25 I want to point out something in particular as it

1 relates to something we talked about earlier, and that is the  
2 overlap of physicians. Again, distinguishing this  
3 marketplace, the overlap of physicians among the different  
4 health plans makes it easier for them to -- for the health  
5 plans to encourage patients to treat -- to get treatment at  
6 other hospitals in the event that ProMedica attempts to  
7 exercise market power by raising prices above competitive  
8 levels.

9 I think that we've got a slide that should show, I  
10 think -- oh, yeah, we do. Slide 36 for just a second.

11 The review that Ms. Guerin-Calvert, who, by the way,  
12 was the economic expert who testified in the Long Island  
13 Jewish case, so it's not like she doesn't have a history of  
14 accurately assessing competitive effects in hospital merger  
15 cases that courts have decided, when they looked at -- when  
16 Meg and her colleagues looked at the physician overlaps, what  
17 we did see was that physicians tend to practice at multiple  
18 hospitals. We wanted to look specifically at the issue for OB  
19 services, and that should be the next slide. And I guess  
20 we're not going to let everybody see that, but you can see  
21 that on your monitor, I think, and I can see it if I look at  
22 the page.

23 There are 19 OBs who admitted patients to St. Luke's  
24 during this time period, 2007 to 2009. Of the 19  
25 obstetricians who admitted patients to St. Luke's, virtually

1 all of them admitted patients to Mercy. You can see that if  
2 you look at the distribution of numbers over the years. And  
3 11 of them admitted more patients to Mercy than to St. Luke's.

4 I think somebody's going to correct me if I get this  
5 wrong. We've highlighted the two OBs who submitted  
6 declarations for the FTC; is that right? And you'll note that  
7 they tend not to admit patients to Mercy hospitals, but most  
8 of the others do.

9 Let me talk for a minute about contract. Plaintiffs  
10 have cited no evidence because no such evidence exists that  
11 ProMedica currently exercises any anticompetitive market  
12 power, nor do they have any evidence that ProMedica will  
13 operate any differently because of the joinder. ProMedica  
14 currently negotiates contracts with commercial payors using  
15 that benchmark that we've discussed known as the cost coverage  
16 rate.

17 Ron Wachsmann's declaration, Ron Wachsmann's  
18 declaration, which is going to be exhibit number TT -- you  
19 don't have to -- I'm just telling you for the record, it's in  
20 the notebooks. I'm not going to flash it up for you on the  
21 screen, but his affidavit describes in detail how it is that  
22 ProMedica negotiates contracts with payors. And they do this  
23 using this cost coverage ratio, where ProMedica attempts to  
24 negotiate rates that cover its direct and indirect costs and  
25 provide it with a small margin.

1           And Mr. Oostra testified that, you know, we'd like to  
2     get a 4 percent margin if we could do it. Frankly, I think  
3     the rating agencies would like for them to get a 4 percent  
4     margin, but they can't. They haven't been able to. They have  
5     been able to get somewhere a little bit north of three percent  
6     but they haven't been able to get to 4 percent.

7           And of course that's no different than what the other  
8     hospitals that are -- even the not-for profits that are  
9     profitable in Toledo do, that's what they strive to do. The  
10    affidavits from the competing hospitals, whether they're the  
11    ones in Toledo or the ones in -- oh, Wood County or Fulton  
12    County all say the same thing. When we negotiate with payors,  
13    first, we try to get the best price we possibly can. I don't  
14    know think the antitrust laws prohibit that. If they do, I  
15    haven't heard about it.

16          And, second, we try to negotiate a price that covers  
17    our costs and gives us a margin so that we can reinvest in our  
18    facility, so that we can make sure our balance sheet is strong  
19    so that we have access to capital.

20          In UTMC's case they have a strong academic mission  
21    that they need to try and fulfill. That costs money, and  
22    that's what that little extra margin is for.

23          So to the extent that ProMedica does that, it's not  
24    doing anything that anybody else is doing. St. Luke's would  
25    like to be able to do that, but so far that wasn't a benchmark

1 that it was able to reach. Without any hard evidence that  
2 ProMedica plans to exert any anticompetitive market power,  
3 Plaintiffs are relying instead on documents created by  
4 St. Luke's to insinuate that the only reason for the joinder  
5 is so that St. Luke's can extract higher rates from commercial  
6 payors.

7 They're not studying any documents that came from us  
8 for that.

9 And that's one of the things that makes this case  
10 distinguishable from the Evanston Northwestern Highland Park  
11 Hospital case. In that case, the documents contemporaneously  
12 prepared documents, prepared by the executives both for  
13 Evanston and for Highland Park made it clear before the -- for  
14 years before the transaction, they thought that merging would  
15 enable both of them to extract anticompetitive higher prices  
16 from payors. It was clear that that was their primary intent  
17 when they pursued the deal, and that was their intent for  
18 years, and it came from both parties' documents.

19 You don't see that in ProMedica's documents here,  
20 number one. Number two, in that case, of course, they had  
21 post-transaction evidence, because the FTC let the deal go  
22 through, they waited four or five years and then said, let's  
23 see what happened, and lo and behold, in that particular case  
24 the evidence demonstrated that Evanston Northwestern  
25 Healthcare Highland Park combined were able to extract higher

1 prices from payors after the deal and remarkably, never  
2 understand this, but remarkably, the CEOs of the two hospitals  
3 boasted about the fact that but for the transaction, they  
4 wouldn't have been able to do that.

5           So the evidence is radically different in that case  
6 than what we have here. In fact, the only post-joinder  
7 evidence that we have here so far was the contract that  
8 ProMedica negotiated with MMO. And while that contract -- for  
9 St. Luke's, just for St. Luke's. And while that contract does  
10 provide for rate increases during the course of the four-year  
11 contract, even at the end, the cost coverage ratio that's  
12 presently estimated will only -- will be less than the cost  
13 coverage ratio that derives from the amount that Paramount is  
14 paying St. Luke's as a in-network provider in the Paramount  
15 network now.

16           Your Honor, I think I've overstayed my welcome as I  
17 talk about competitive effects, and we have a couple of other  
18 topics to cover this afternoon. So I think I'm going to sit  
19 down and close with simply telling you that we think  
20 ProMedica's commitment to continue to maintain and operate  
21 St. Luke's as a locally managed and controlled community  
22 hospital in the end will put the community, the Toledo  
23 community, in a better position than it would have been absent  
24 the joinder.

25           And with that, I'll let Mr. Wu explain to you why it

1 is that the parties pursued this transaction.

2 MR. WU: Your Honor, a natural question after hearing  
3 Plaintiff's argument, is what were St. Luke's and ProMedica's  
4 true motivations for entering into their joinder agreement. I  
5 will address that question and the process that St. Luke's  
6 went through to search for an affiliation partner and why  
7 St. Luke's and ProMedica chose to proceed with their joinder.

8 For St. Luke's, the main motivation for seeking an  
9 affiliation was that its senior management and its board  
10 concluded that it could no longer continue as a full-service  
11 stand-alone independent community hospital.

12 Now, this morning you heard a lot about St. Luke's  
13 CEO, Dan Wakeman's three-year turnaround plan and how it  
14 resulted in increased volumes and increased revenue. Now,  
15 that's all true. But as my colleague, Ms. Carletti,  
16 described, those turnarounds failed to preserve St. Luke's  
17 ability to continue as a stand-alone independent community  
18 hospital.

19 Indeed, St. Luke's senior management recognized that  
20 its efforts to gain revenue through volume weren't working  
21 because they simply weren't enough to overcome its poor  
22 financial condition. In addition, St. Luke's had to devise a  
23 strategy for reacting to and complying with the passage of the  
24 landmark healthcare reform law, which mandates or effectively  
25 requires several costly initiatives on the part of hospitals,



1 including investments in IT infrastructure, the ability to  
2 accept risk for patients, the ability to accept bundled  
3 payments from Medicare as it was coordinating care among  
4 different types of providers in the community.

5 Therefore, St. Luke's found itself at a crossroads,  
6 and for a fiercely independent hospital, there were no perfect  
7 options, and St. Luke's management thus reported that going it  
8 alone would be extremely challenging and weighed whether to  
9 give up St. Luke's cherished independence.

10 As it began evaluating potential affiliation  
11 partners, St. Luke's examined several factors, not just  
12 increased reimbursement rates, as Plaintiffs would have you  
13 believe. The factors that St. Luke's board considered when it  
14 ultimately approved a joinder included, for example, cultural  
15 compatibility, access to capital, the ability to better manage  
16 expenses, as well as, of course, the ability to respond to a  
17 reformed healthcare marketplace.

18 St. Luke's CEO, Dan Wakeman, the FTC's proclaimed  
19 turnaround expert, states in paragraph 7 of his supplemental  
20 declaration exactly what St. Luke's was seeking from an  
21 affiliation.

22 (Video played as follows:)

23 "St. Luke's poor financial condition in the years  
24 prior to the joinder with PHS was a motivating factor for  
25 St. Luke's consideration of the joinder, as well as its

1 consideration of other possible affiliations. St. Luke's  
2 financial condition required it to affiliate with a system  
3 that could provide it with an infusion of capital and a stable  
4 financial structure for future investment in St. Luke's  
5 physical plant and clinical operations to meet the  
6 requirements of healthcare reform.

7 "St. Luke's hope that any affiliation with another  
8 hospital system would allow it to cover more of its direct and  
9 indirect costs of providing care, including making up for the  
10 cost of shortfalls in Medicare and Medicaid reimbursement,  
11 charity care and bad debt, through above-cost reimbursement  
12 rates from commercial payors. St. Luke's also hoped that any  
13 affiliation with other hospital systems would result in  
14 reimbursement rates from its commercial payors that would  
15 allow St. Luke's to earn a positive margin to reinvest in its  
16 facilities and services."

17 (Video concluded.)

18 Therefore, in late 2009 -- late 2008, excuse me, and  
19 early 2009, St. Luke's began its search for a potential  
20 affiliation partner by contacting a number of hospital systems  
21 located outside of Toledo. These comprised namely of the  
22 Cleveland Clinic, the University of Michigan Health System,  
23 and McClaren Health. However, none of these hospital systems  
24 were interested in a potential affiliation with St. Luke's.

25 As to the Cleveland Clinic, it demanded that

1 St. Luke's first pay the Cleveland Clinic about \$300,000 to  
2 conduct preliminary due diligence of St. Luke's.

3 Given St. Luke's current financial condition at the  
4 time, it declined the Cleveland Clinic's invitation to spend  
5 more money to disclose exactly what St. Luke's already knew  
6 about its poor financial condition and its operational  
7 challenges.

8 Now, St. Luke's also contacted the University of  
9 Michigan health system in nearby Ann Arbor. However, the  
10 University of Michigan health system neither wanted to disrupt  
11 its patient referral patterns from northwest Ohio nor provide  
12 St. Luke's with a significant influx of capital that it  
13 recognized St. Luke's required.

14 Finally, St. Luke's also reached out to McClaren  
15 Health, which it -- also based in Michigan, which had grown in  
16 the past through a series of acquisitions. However, McClaren  
17 told St. Luke's that its location in the southwest Toledo area  
18 did not fit within McClaren's strategic geographic plan.

19 With no partners outside of Toledo, St. Luke's then  
20 considered the other Toledo area hospitals as potential  
21 partners.

22 As Mr. Marx alluded to earlier, St. Luke's first  
23 considered an affiliation with the University of Toledo  
24 Medical Center. Despite beginning talks with the UTMC first  
25 out of the local systems and even signing a Memorandum of

1 Understanding with the UTMC in April of 2009, St. Luke's and  
2 UTMC never got to the point of conducting due diligence or  
3 discussing what the structure of any potential affiliation  
4 would look like.

5 In any event, an affiliation with UTMC raised serious  
6 and numerous concerns with St. Luke's senior management and  
7 its board. For example, St. Luke's was very concerned about  
8 how UTMC's academic culture, which focuses on teaching  
9 residents and research, would mesh with St. Luke's culture,  
10 which focused exclusively on providing quality patient care,  
11 as stated by St. Luke's board chairman, Jamie Black, in  
12 paragraph 17 of his declaration.

13 St. Luke's was also concerned about the UTMC's  
14 apparent tin ear for employee relations, as shown by awarding  
15 bonuses to senior leadership at a time when it was laying off  
16 employees. St. Luke's was also concerned about UTMC's  
17 unionized workforce.

18 CEO Dan Wakeman summarized his concerns about UTMC to  
19 members of the St. Luke's board in writing.

20 The superior/inferior attitude was fueled by their  
21 academic base and the perceived poor management practices by  
22 St. Luke's, as verified by our operational losses. Comments  
23 such as our pension shortfall being a deal breaker even before  
24 we start, or that our HR benefit management could benefit from  
25 their expertise. General comments from UTMC staff and board

1 members that once they take over St. Luke's, it will be run  
2 like a real business.

3 Now, more fundamentally, St. Luke's leadership was  
4 concerned about UTMC's lower quality and much higher cost of  
5 providing care, particularly in light of healthcare reform.  
6 St. Luke's CEO Dan Wakeman summarized these concerns about a  
7 potential affiliation with UTMC in paragraph 32 of his  
8 declaration.

9 (Video played as follows:)

10 "St. Luke's senior management and its board were  
11 concerned about -- concerned that UTMC as a state entity was  
12 bureaucratic and would not have the flexibility financially to  
13 affiliate with St. Luke's. St. Luke's was also concerned  
14 about UTMC's higher costs of providing care, its lower quality  
15 scores and it's unionized workforce."

16 (Video concluded.)

17 Besides the UTMC, St. Luke's also explored a  
18 potential joint venture or a full-blown merger with Mercy  
19 Health Partners.

20 Specifically, St. Luke's and Mercy explored service  
21 line joint ventures that would have covered cardiac services  
22 and women's and children's services. These would essentially  
23 consist of consolidating cardiac services at Mercy and women's  
24 and children's services at St. Luke's.

25 Now, the FTC has argued that instead of a joinder

1 with ProMedica, St. Luke's could have pursued joint ventures  
2 with another partner and obtained much of the same benefits  
3 it's going to accrue from a ProMedica joinder. However, and  
4 as you'll see on your monitor, St. Luke's and Mercy, with the  
5 aid of a consultant, Healthcare Futures, concluded that these  
6 joint ventures simply weren't feasible.

7 Having determined that a joint venture or series of  
8 joint ventures wouldn't be feasible, St. Luke's then  
9 approached Mercy about the possibility of a full-blown merger.  
10 However, Mercy recognized the problems that an affiliation  
11 with St. Luke's would pose. Indeed, Mercy enumerated the same  
12 issues, operational, capital, reimbursement, that St. Luke's  
13 had itself identified as serious problems, as shown on points  
14 one, two and three of the slide that's on your monitor.

15 Tellingly, Mercy came to the same conclusion that  
16 St. Luke's had. Namely, that it had a major commercial  
17 reimbursement issue. Mercy ultimately concluded that a merger  
18 with St. Luke's was not to its advantage, and it would be  
19 better served simply competing with a combined ProMedica and  
20 St. Luke's.

21 In fact, Mercy made its views known through a news  
22 letter in which it stated: We believe that a partnership or  
23 merger with St. Luke's would ultimately encumber our own  
24 strategic advances, and, rather, it is to our advantage to  
25 invest our capital, management expertise and time in our own

1 southwest strategy.

2 Now, even as St. Luke's was thinking about giving up  
3 its independence, it was still trying to preserve some measure  
4 of autonomy and local control. Not surprising, given its  
5 history of fierce independence. However, St. Luke's senior  
6 management and its board were both concerned that a merger  
7 with Mercy, part of Catholic Healthcare Partners, which as you  
8 know is headquartered in Cincinnati, would result in a loss of  
9 local control and governance.

10 At the same time that the board and the senior  
11 management were considering a merger with Mercy, St. Luke's  
12 medical staff made it known that it would oppose any merger  
13 with Mercy because of its poor relations with staff  
14 physicians, further complicating the actual implementation of  
15 how any merger with Mercy would work, as shown in paragraph 33  
16 of Mr. Wakeman's declaration.

17 Given these alternatives, St. Luke's then decided to  
18 respond to ProMedica's overtures. The two had initially  
19 discussed potential service language, very similar to what  
20 Mercy and St. Luke's had discussed. Not surprisingly, the two  
21 also concluded that only a full merger might work -- a full  
22 joinder might work. And, in fact, that's what they did. They  
23 concluded that a full joinder would best address both parties'  
24 needs, St. Luke's on the one hand, ProMedica's on the other,  
25 as well as that of the communities they serve.

1           For example, in an e-mail to St. Luke's CEO, Dan  
2           Wakeman on August the 4th of 2009, the chairman of the board  
3           for St. Luke's parent entity, Ohio Care Health System, William  
4           Aman (phonetic) wrote: We've not talked much about the  
5           ProMedica option, but when personalities are put aside, it may  
6           be the easiest option to accomplish with the greatest  
7           community benefit without having to totally sacrifice our  
8           independence and identity.

9           Accordingly, St. Luke's entered into the joinder  
10          agreement for a number of reasons, as St. Luke's CEO Dan  
11          Wakeman states in paragraph 35 of his declaration.

12          (Video played as follows:)

13                 "St. Luke's entered into the joinder agreement with  
14                 PHS for several reasons. First, St. Luke's poor financial  
15                 performance, despite treating more patients over time,  
16                 threatened its viability as a stand-alone community hospital.

17                 "Second, St. Luke's needed capital to invest in the  
18                 infrastructure, fund its pension obligations and increase  
19                 employee compensation, all of which St. Luke's had deferred  
20                 because of the lack of operating funds.

21                 "Third, St. Luke's needed to align itself with other  
22                 local healthcare systems to prepare for changes in healthcare  
23                 delivery that healthcare reform will accelerate."

24          (Video stopped.)

25          Now, that was St. Luke's perspective.



1 ProMedica, on the other hand, initially shared many  
2 of the same concerns identified by St. Luke's itself and by  
3 Mercy. As ProMedica's CEO, Randy Oostra stated in  
4 paragraph 17 of his declaration.

5 (Video played as follows:)

6 "PHS had concerns about the potential joinder with  
7 St. Luke's. PHS's concerns included the fact that St. Luke's  
8 financial condition was weak and deteriorating. St. Luke's  
9 was in default on its bond obligations, it had an unfunded  
10 pension obligation of about \$45 million, it had deferred  
11 capital expenditures on its physical plant for many years, had  
12 not made the necessary investment in IT infrastructure to  
13 begin to adopt the electronical (sic) medical records programs  
14 it would need under healthcare reform.

15 "PHS's board was concerned that St. Luke's financial  
16 condition might have a negative impact on PHS's own financial  
17 condition going forward."

18 (Video stoped.)

19 Nevertheless, after thorough due diligence, ProMedica  
20 concluded that a joinder between it and St. Luke's would  
21 benefit each other and the community, as Mr. Oostra explains.

22 (Video played as follows:)

23 "PHS's board concluded that the joinder with  
24 St. Luke's was in the best interest of both hospitals and of  
25 the communities they serve.

1           "Both PHS and St. Luke's have a strong commitment to  
2     serving their local communities. By adding St. Luke's to its  
3     system, PHS believed that it could achieve operating  
4     efficiencies and that it could avoid the capital costs of  
5     constructing a new hospital facility on land, known as the  
6     Arrowhead property, in the southwest portion of Toledo, where  
7     PHS had planned to build a new facility."

8           (Video stopped.)

9           Now, ProMedica had also concluded that a joinder with  
10    St. Luke's would allow it to right-size the services and  
11    overcapacity within its system in a way that will not impact  
12    patient care, expand the geographic reach of its system and  
13    improve quality by sharing best practices.

14           Importantly, and I can't emphasize this enough,  
15    ProMedica did not enter into or ever consider that the  
16    St. Luke's joinder would allow it to raise reimbursement rates  
17    from commercial payors above the competitive level. Indeed,  
18    the Plaintiffs can point to no ProMedica document out of the  
19    4 million pages it produced in response to the FTC's  
20    investigation that states ProMedica, as a result of this  
21    joinder, will gain the ability to raise either St. Luke's  
22    rates or its own above the competitive level.

23           To summarize, the St. Luke's and ProMedica joinder  
24    enables both parties to meet their critical objectives. For  
25    St. Luke's, it maintains an independent board, it gives it

1 access to the capital that it was denied, it will allow it to  
2 achieve cost savings, it will provide the potential to  
3 stabilize the financial condition of the system, which I think  
4 no one will dispute. And last, but not least, it will provide  
5 the ability for St. Luke's, as a formerly independent  
6 stand-alone community hospital, to be able to meet the  
7 requirements of healthcare reform.

8 For ProMedica, a joinder with St. Luke's will allow  
9 it to improve the geographic access to its system, it will  
10 enable ProMedica to realign the services within its system to  
11 better meet the community's needs; and, lastly, it will  
12 enable -- it will allow it to increase clinical best practices  
13 by sharing those best practices between it and St. Luke's.

14 THE COURT: I guess another one also, it would  
15 eliminate the need to build the Arrowhead facility.

16 MR. WU: That's exactly right, and that's a  
17 significant cost avoidance savings for the system.

18 Now, as a result of their negotiations, ProMedica is  
19 contractually obligated to operate St. Luke's as a fully  
20 operational community hospital for the next decade, while  
21 preserving core services, including obstetrics, St. Luke's  
22 independent board, St. Luke's medical staff and even the  
23 St. Luke's name and logo. Again, ProMedica is obligated to do  
24 this for the next decade, long after the FTC proceeding and  
25 any appeals are exhausted.

1           Moreover, ProMedica cannot change these obligations  
2     without the consent of St. Luke's independent board of  
3     trustees, who have a fiduciary duty to their hospital, not  
4     ProMedica.

5           Now, I want to point you to -- I don't have a slide,  
6     but Article 16.3 explicitly lays out and recognizes the right  
7     of St. Luke's board to enforce these commitments that  
8     ProMedica had made, and that can be found at PX58.

9           THE COURT:   What's the role of the parent of  
10    St. Luke's?   What is it intended to be after the joinder?

11          MR. WU:    By parent, I take your question to refer to  
12    the St. Luke's board?

13          THE COURT:   No, Ohio --

14          MR. WU:    As a result of the joinder, Ohio Care, I  
15    believe --

16          THE COURT:   Disappears?

17          MR. WU:    No longer exists.

18          THE COURT:   Thank you.

19          MR. WU:    Now, in addition to preserving St. Luke's,  
20    the joinder will create significant pro-competitive benefits  
21    that Mr. Marx will now address, unless you have any further  
22    questions.

23          THE COURT:   Thank you, no.

24          MR. MARX:   Almost there, Your Honor, for today,  
25    anyway.

1 I want to spend a few minutes talking about the  
2 pro-competitive benefits of the transaction that Mr. Wu just  
3 alluded to.

4 I want to direct your attention, as well, because I'm  
5 not going to go into great detail about it, but Gary  
6 Akenberger's affidavit, which is exhibit BBB, contains a lot  
7 of the details surrounding what it is that I'm going to try  
8 and summarize in sort of a high level fashion before we finish  
9 for today.

10 The Plaintiff's proposed preliminary injunction, and  
11 I'll have a lot more to say about this tomorrow, threatens to  
12 reverse the pro-competitive benefits that the parties, and by  
13 extension the community, have already recognized, as well as  
14 the benefits that are yet to come. The joinder's already  
15 benefited St. Luke's and its patients by financially  
16 stabilizing the flailing hospital and preventing some of the  
17 drastic measures that St. Luke's was going to have to  
18 implement to remain financially viable.

19 And there I'm referring to significantly cutting  
20 services and personnel, which reminds me about something that  
21 I forgot to mention earlier today. You may remember that  
22 slide that Mr. Reilly put up that alluded to how much of a  
23 decrease in St. Luke's market share there would have to be to  
24 irradiate this presumption of illegality that the market  
25 shares in the -- remember that slide up and then down.

1           And he said, and I think I got this right, that there  
2       were no documents that you would find that suggested at all  
3       that as a result of this transaction, St. Luke's share would  
4       drop to the levels that would eliminate the presumption.

5           And my colleagues reminded me that there was a  
6       document -- there were documents that discussed that as it  
7       relates at least to OB services, because you'll recall, or I  
8       know we've cited, and I'll have them for you if I need to  
9       tomorrow, there were documents that St. Luke's created that  
10      said our financial situation's really bad. We need to  
11      consider cutting -- I think Ms. Carletti talked about this --  
12      we need to consider cutting OB services, we need to consider  
13      cutting cardiovascular surgery, and then a whole host of other  
14      services that frankly aren't general acute inpatient care  
15      services.

16           And the significance of that document is that if  
17      that's what St. Luke's had done, its market share and OB  
18      services would have dropped to zero percent. It wouldn't have  
19      been in that market segment anymore.

20           So it's not an issue of whether or not there are  
21      documents that show it would have dropped to 1.2 percent or  
22      1.8 percent, it would have been gone.

23           So to suggest there are no documents that  
24      contemplated that possibility, that's not right. There were  
25      documents that contemplated.

1           And one of the pro-competitive benefits that resulted  
2           from this transaction, from this joinder, is the fact that  
3           that wasn't necessary anymore.

4           In addition, the joinder infused St. Luke's with  
5           additional capital to pursue much needed capital upgrades,  
6           including federally-mandated IT upgrades.

7           The joinder -- the FTC poo-poos this stuff, but it's  
8           not insignificant, and Gary Akenberger's affidavit talks about  
9           it. The joinder also permits the parties to achieve  
10          significant savings by taking advantage of scale, economies  
11          and infrastructure and services that the hospitals cannot  
12          implement alone.

13          The parties estimate that they will achieve  
14          approximately 27 to \$30 million in savings annually and 125 to  
15          \$150 million in capital avoidance savings. And you recognized  
16          one of the big capital avoidance savings was the elimination  
17          of the need to build a new facility at Arrowhead, and that's  
18          one of the two big ones. But the other big one we shouldn't  
19          lose sight of is the avoidance of the need to build the new  
20          patient tower at Flower. And the reason for that is, Flower's  
21          got mostly semi-private rooms. It's not the industry norm.

22          If, if ProMedica's joinder with St. Luke's doesn't go  
23          forward, then ProMedica contemplated that it would have to  
24          build a new patient tower at Flower that would have private  
25          rooms, at a cost of -- I can't remember if that was -- give me

1 a second and I'll get you the number.

2 It was a lot of money.

3 And that cost will be avoided, too. And what that  
4 means is the funds that ProMedica won't have to spend  
5 duplicating resources that are already there and  
6 under-utilized, can be used for other purposes to benefit the  
7 community.

8 Now, entry of the Plaintiff's requested preliminary  
9 injunction threatens to irradiate all of those benefits. And  
10 I would point out to the extent that that preliminary  
11 injunction that the Government has imposed is entered by the  
12 Court, it seriously diminishes, decreases ProMedica's ability  
13 to and incentive to invest the \$30 million of capital that the  
14 joinder agreement requires ProMedica to invest over the course  
15 of the next three years.

16 It's interesting, the Government sort of wants it  
17 both ways. It doesn't want ProMedica to be involved at all in  
18 St. Luke's operations. Doesn't want the joinder agreement to  
19 go forward at all, but it does want to force ProMedica to make  
20 St. Luke's better than it was the day before the joinder  
21 occurred.

22 And quite frankly, Your Honor, we will discuss this  
23 at more length tomorrow. They can't have it both ways. If --  
24 if a preliminary injunction is entered here, and we don't  
25 think you should, but if you do enter one, you can't enter one



1 that the law doesn't allow you to enter one that requires us  
2 to make St. Luke's better than it was the day that we got it.

3 The most you can do, I think, if you do anything,  
4 would be to say you can't make it worse than it was when you  
5 got it. But you can't impose an affirmative obligation to us  
6 to say, you got to invest \$30 million that, frankly, you know,  
7 we had no obligation to invest prior to the time of the  
8 joinder. That's a big difference. We'll talk about that  
9 tomorrow.

10 Now, the joinder has significantly benefited  
11 St. Luke's and its patients by immediately securing the  
12 financial viability of the hospital. Ms. Carletti explained  
13 that prior to the joinder, St. Luke's had a financial problem.  
14 This chart identifies it.

15 Its bond rating had been downgraded, it was in  
16 technical default on its bond obligations, it didn't have the  
17 capital that it needed to maintain its infrastructure and  
18 prepare for the evolution of healthcare reform, and, of  
19 course, there was that lingering \$45 million under-funding of  
20 its pension obligation.

21 When it joined with ProMedica on September 1st, those  
22 problems were immediately alleviated. Pursuant to the terms  
23 of the joinder agreement, St. Luke's has become part of  
24 ProMedica's financially obligated group, which means that  
25 ProMedica has assumed responsibilities for -- assumed

1 responsibility for St. Luke's liabilities, including those  
2 bonds that it was in technical default on, and its unfunded  
3 pension liability.

4 ProMedica negotiated with Ambac to cure that pesky  
5 bond default status, bond covenant violation status. And  
6 immediately -- well, within the time it was required,  
7 ProMedica contributed \$5 million to St. Luke's foundation and,  
8 of course, is committed to contribute another \$30 million over  
9 three years to fund capital improvements that St. Luke's had  
10 deferred because it didn't have the capital to make the  
11 investments.

12 So St. Luke's bond rating moved up. Where did it  
13 move to? I think it was better than it was in 2008, before,  
14 before -- there we go. It was better than it was in 2008  
15 before Moody's made the first reduction of St. Luke's bond  
16 rating from whatever -- I guess it was A1 down to A2, and then  
17 they bumped it down to Baa2 in February 2010, and after the  
18 joinder with us, St. Luke's now has a bond rating of Aa3,  
19 which means its cost of capital to the extent that it needs it  
20 is even lower.

21 Now, as you know, the joinder alleviated St. Luke's  
22 doomsday plans of cutting services or personnel, but  
23 St. Luke's only, only rejected those possibilities because it  
24 chose, instead, to affiliate with another entity that could  
25 and would maintain St. Luke's as a full-service community

1 hospital going forward.

2 And you can take that slide off. We can go to the  
3 13, I think.

4 Mr. Wu showed you this a minute ago. Section 7.1 of  
5 the joinder agreement is very important. It obligates  
6 ProMedica to maintain St. Luke's using its current name and  
7 identity and its current location for a minimum of 10 years  
8 after the closing date as a fully operational acute care  
9 hospital providing the services listed.

10 Section 13.2 prohibits ProMedica from taking any  
11 action that would cause St. Luke's to cease to operate as a  
12 general acute care hospital.

13 No other hospital merger case exists that I know of  
14 where the hospital, acquiring hospital, has made a similar  
15 commitment to this one. The community benefit commitment that  
16 the Butterworth case talks about, it's not the same thing.  
17 This is a commitment between the two parties that negotiated,  
18 hotly negotiated, frankly, the transaction to maintain the  
19 hospital as a fully operational general acute inpatient care  
20 services hospital.

21 Now, the community benefits and Dr. Peron's  
22 declaration, the exhibit number to which I should know, but  
23 don't -- discusses this, and Dr. Peron said -- ah -- 000,  
24 actually, is the exhibit number. He says, I believe that if  
25 St. Luke's continues to put off needed investments in its

1 physical plant -- and he, by the way, is the chairman of the  
2 division of urology at St. Luke's and a former member of  
3 St. Luke's medical executive committee -- he believes that if  
4 St. Luke's continues to put off needed investments in its  
5 physical plant, which is much older than average, on average  
6 than the rest of the hospitals in the Toledo area, and in its  
7 services, it might not continue to provide the same quality of  
8 care that its patients have come to expect.

9 And, in fact, we'll see when we talk more in detail  
10 tomorrow about this particular issue, unfortunately,  
11 unfortunately, what we have found was because of St. Luke's  
12 financial situation and Mr. Oostra testified about this in his  
13 deposition last week, indeed, the indicators are that St.  
14 Luke's quality of care has diminished some during the tail end  
15 of 2009 and into 2010 before the time that it joined with us.

16 So the financial situation that existed there was  
17 beginning to have, it appears to us, based on the quality data  
18 that's being reported, to have had an impact, unfortunately,  
19 at St. Luke's. That's something we intend to turn around if  
20 you'll let us, but if not, I think it presages what's likely  
21 to happen if this injunction is entered the way that the  
22 Government wants you to.

23 Now, ProMedica's already committed \$5 million in  
24 capital to the foundation, it's committed another \$30 million,  
25 and you might say, well, what for? Well, Section 6.1 of the

1 joinder agreement -- shall commit a minimum -- a minimum of  
2 \$30 million to St. Luke's over the three-year period following  
3 the closing date.

4 What is St. Luke's likely to use that \$30 million  
5 for? Exhibit 6.1 talks -- now, we'll go there -- about that.  
6 These are capital projects that are to occur at the St. Luke's  
7 main campus. And there are several of them. Update their  
8 information technology systems, construct -- do some  
9 construction on an outpatient lobby, conversion of all  
10 existing patient rooms in St. Luke's to updated private rooms.  
11 Again, right now, St. Luke's has semi-private rooms. Not the  
12 industry norm. Renovate the heart center, and so on.

13 These were all items that were negotiated and agreed  
14 by the parties that that \$30 million, the minimum of  
15 \$30 million, would be used to fund, all projects that  
16 St. Luke's couldn't do on its own.

17 And as Ms. Lori Johnson's affidavit says, the  
18 information technology investment is particularly important,  
19 because the healthcare reform law requires hospitals to invest  
20 in an electronic health record and other systems, like disease  
21 registries and computerized physician order entry systems, and  
22 then integrate those systems with its existing core IT  
23 applications and similar systems located in physicians'  
24 offices.

25 This is the whole notion of what we refer to as

1 clinical integration.

2           These IT upgrades will benefit patients by enabling  
3 healthcare providers to comply with evidence-based best  
4 practices, and if the hospitals fail to achieve the meaningful  
5 use requirements by 2015, they're going to face cuts in  
6 Medicare reimbursement.

7           Prior to the joinder with ProMedica, St. Luke's  
8 couldn't have afforded those IT upgrades.

9           There are other efficiencies that have resulted  
10 already and that will continue to result because of and only  
11 because of the transaction. These are the kinds of things  
12 that Gary Akenberger talks about in his declaration. I'll  
13 just highlight a couple. ProMedica's added St. Luke's to  
14 ProMedica's medical malpractice insurance policy. That saves  
15 St. Luke's about \$600,000 over a 12-month period. And while  
16 the ongoing savings may be only \$273,000 per year, St. Luke's  
17 couldn't have done this by itself. It's because St. Luke's is  
18 able -- we're able to spread the risk over an additional  
19 hospital. St. Luke's couldn't do that by itself.

20           You know, \$594,000 might not seem like a lot.  
21 \$273,000 might not seem like a lot, but if you're losing  
22 15.9 million every year, it's not unimportant.

23           St. Luke's saved another 50,000 when ProMedica added  
24 it to its neonatal services contract.

25           Gary Akenberger's affidavit talks about a whole host

1 of cost savings that integration teams from ProMedica and  
2 St. Luke's have worked together since the joinder occurred.

3 No question, a lot of this integration work did not  
4 take place before the parties decided to enter into the  
5 joinder transaction back in, gosh, it seems like just  
6 yesterday, but it was May 2010. But what the parties did was  
7 say, are there opportunities there that we think we might be  
8 able to achieve, and they identified them. Did they run them  
9 all to ground? Did they do the kind of efficiency study that  
10 the FTC would credit? And, frankly, to be honest with you,  
11 I'm not sure they would ever credit an efficiency study that  
12 hospitals did because their standards are just impossible to  
13 meet.

14 But that doesn't mean that there aren't good business  
15 case efficiencies and cost-saving opportunities there.

16 Since the joinder occurred, Gary Akenberger and a  
17 group of others from both hospitals have been working together  
18 to say where can we save money, big and small. That's what  
19 Gary's affidavit is all about, and that's where he comes up  
20 with the numbers that are reflected or will be reflected in a  
21 minute.

22 Yeah, that's one of them.

23 Those service line opportunities and integration  
24 opportunities, I think a big chunk of that, frankly, Your  
25 Honor, is the contemplated consolidation of the open heart

1 surgery program at St. Luke's with the Toledo Hospital. That  
2 program's just bleeding money as a practical matter, and  
3 St. Luke's doesn't do enough of those cases to be able to  
4 support it.

5 But in any event, Gary and his people have come up  
6 with, as indicated in the affidavit, about \$19 million-worth  
7 of cost savings.

8 Included among those, I think as well are some back  
9 room kinds of things. You know, better prices for supplies  
10 that St. Luke's will be able to get when it purchases through  
11 the volumes that ProMedica can achieve, a whole host of, for  
12 lack of a better term, back room cost savings that St. Luke's  
13 couldn't get by itself, but once it integrates with ProMedica,  
14 it can.

15 Reduced cost for physician coverage. St. Luke's  
16 couldn't do it by itself. For whatever reason, ProMedica has  
17 a better deal with physicians to provide -- to provide  
18 coverage during odd hours.

19 And then, of course, there are these capital cost  
20 avoidances. Ah, here we go. Flower was 25 to 30 million in  
21 capital cost, with operating costs avoided of about 1.6 to  
22 \$2 million on an annual basis. Of course, that 60-bed  
23 hospital at Arrowhead would have been 90 to a hundred million  
24 dollars that they can save.

25 The implementation of electronic medical records at



1 St. Luke's, this is a big deal, would save six to \$10 million  
2 and another about a million dollars-worth of ongoing savings.

3 That's where the real efficiencies are. Those are  
4 benefits that we think benefit not only the parties that they  
5 couldn't achieve by themselves, but will also ultimately  
6 benefit the community.

7 As I've said, entry of the preliminary injunction  
8 will eliminate all of these benefits, has the potential to  
9 eliminate all of them. ProMedica would have a diminished  
10 incentive to continue its investment in St. Luke's if the  
11 Court grants the preliminary injunction the Plaintiffs seek.  
12 And ProMedica's integration teams, Gary Akenberger's teams,  
13 would lose the momentum towards integration -- integration,  
14 consistent, by the way, with the joinder agreement that  
15 they've already generated.

16 For all of these reasons, all the reasons that we've  
17 been discussing this afternoon, in the absence of the joinder,  
18 St. Luke's future competitive viability, and that's really  
19 what this relates to, would be as perilous as it was before  
20 the consummation of the joinder last September.

21 Absent the joinder, St. Luke's would revert back to  
22 its pre-joinder financial state, facing mounting debt  
23 obligations, likely reverting to its barely above junk status  
24 credit rating, which would jeopardize its ability to borrow  
25 additional cash and increase its cost of doing it, and lacking

1 the capital it needs to make the deferred capital improvements  
2 required to prepare for and comply with the requirements of  
3 healthcare reform.

4 That would be, that would be St. Luke's state if you  
5 entered the preliminary injunction that the Government  
6 requests. And because we don't want to turn back the clock  
7 that way, and because we don't think the Government has  
8 satisfied its burden of showing that it can ultimately succeed  
9 on the merits of this case, or that the injunction would be in  
10 the public interest, we respectfully request that you deny  
11 their request.

12 That's it for us for today. We'll be back tomorrow,  
13 I think after Mr. Reilly and the FTC spend an hour talking  
14 about what we've been talking about. We'll talk for an hour  
15 and a half about, I think, probably a little bit more focused  
16 response to some of the points that Mr. Reilly made this  
17 morning, and, of course, whatever else he throws at us  
18 tomorrow morning, to the extent that I'm able enough to  
19 respond to them, and we'll also talk about, specifically about  
20 the terms of this preliminary injunction that they've proposed  
21 and why it -- it's the wrong thing for the Court to do.

22 THE COURT: Thank you all very much.

23 MR. MARX: Thank you, Your Honor.

24 THE COURT: See you tomorrow morning at 9:00.

25 (The evening recess was taken at 4:54 p.m. Court to

reconvene on Friday, February 11, 2011, at 9:00 a.m.)

\* \* \* \* \*

CERTIFICATE

I, Stephen W. Franklin, Registered Merit Reporter, and  
Certified Realtime Reporter, certify that the foregoing is a  
correct transcript from the record of proceedings in the  
above-entitled matter.

Dated this 10th day of FEBRUARY, 2011.

/s/Stephen W. Franklin

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Stephen W. Franklin, RMR, CRR

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